Supreme Court, U.S.
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NO. 99-____

IN THE

Supreme Court of the United States

EDDIE BARTELS, *ET AL.*
Petitioners,

v.

RICHARD RILEY, SECRETARY OF EDUCATION, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 27, 1999

3 DEP

QUESTION PRESENTED

Do federal laws concerning the federal student loan program, 20 U.S.C. §§ 1071 *et seq.*, preempt state agency law and any other applicable state laws that would allow borrowers to raise fraudulent misrepresentations by a school as a defense against repayment of a loan in circumstances where the school acts as the lender's agent?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Eddie Bartels, Alfreda C. Bantum, Ruby C. Carr, Michele Cross, Sharon Days, Iris Hull, Mary L. Manley, Iris Miller, Linda Mosley, Alethia Pickney, Octavis Roberson, Leonie Smart, Shirley Travis, and Doretha Young, all of whom are former students of Riley Training Institute of Georgia. Petitioners were plaintiffs and appellants in the proceedings below. Defendants-appellees in the proceedings below are Secretary of Education Richard Riley, in his official capacity, the Georgia Higher Education Assistance Foundation, the Higher Education Assistance Foundation, and the Student Loan Marketing Association. Defendants-appellees are assignees of one or more student loans for petitioners.

Alabama Commercial College, the operator of the Riley Training Institute, was a defendant in the district court below but was not a party to the appeal. A default judgment was entered against Alabama Commercial College in the district court.

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The opinion of the Court of Appeals for the Eleventh Circuit is not reported but is set forth in the Appendix at pages 1a-13a. The opinion of the district court that was affirmed in relevant part by the Eleventh Circuit is reported at 918 F. Supp. 1565 and is set forth at pages 14a-29a of the Appendix.

JURISDICTION

The judgment of the Eleventh Circuit was entered on June 29, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

The Appendix, at 32a, sets forth the regulations cited by the Eleventh Circuit as the basis for its ruling that federal law preempts the common law of agency and any other applicable state laws that impose liability on loan holders for the school's acts as agent of the lenders. *See* Appendix 8a (citing 34 C.F.R. §§ 682.200, 682.206(a), (b) (1998)).

STATEMENT OF THE CASE

This petition seeks review of an Eleventh Circuit ruling that, because the Guaranteed Student Loan Program ("GSLP") permits lenders to use schools as their agents in arranging loans, state laws that allow a borrower to raise fraudulent misrepresentation by the lender's agent as a defense to collection of a loan are preempted. The issue presented here is closely related to the issue presented in the pending petition for certiorari in No. 99-395 (filed Sept. 2, 1999), which seeks review of the District of Columbia Circuit's ruling that, because federal authorities had decided not to enforce federal regulations designed to make lenders liable for fraudulent representations by a school acting on its behalf, a local statute that authorizes borrowers to raise defenses based on the school's misconduct was preempted.

Armstrong v. Accrediting Council for Continuing Education and Training, Inc., 168 F.3d 1362, *amended*, 177 F.3d 1036 (D.C. Cir. 1999). We urge that these two petitions be considered together. Both decisions address federal preemption of claims based on misconduct by schools that act on behalf of lenders; both decisions find preemption of state law on the basis that federal law *permits* schools to act as agents for lenders; and both preemption rulings are in conflict with the Seventh Circuit's analysis in *Veal v. First American Savings Bank*, 914 F.2d 909 (1990), which stated that state law defenses were not preempted by the Higher Education Act.

Petitioners in this case are student loan borrowers who enrolled in a Georgia vocational school called Riley Training Institute during the period 1988-1991. The Training Institute subsequently closed and filed for bankruptcy. In 1993, petitioners brought suit seeking damages from the Training Institute for fraud, breach of contract and unfair trade practices. The bankruptcy court excepted the action from the automatic stay and the school, which appears to have no assets, defaulted. Petitioners also joined as defendants the Secretary of Education, and two guaranty agencies and a secondary market purchaser of student loans who, as holders of the loans arranged by the Training Institute under the GSLP, demanded that petitioners repay the loans despite the school's misconduct. After the school defaulted, the case proceeded against these defendants. Jurisdiction over this action arose under 20 U.S.C. § 1082(a)(2), 28 U.S.C. §§ 1331 and 1367. *See Bartels v. Alabama Commercial College*, 54 F.3d 702 (11th Cir. 1995).

As discussed in more detail in the petition in *Armstrong v. Accrediting Council for Continuing Education and Training, Inc*, No. 99-395, the GSLP is an incentive program established by the Higher Education Act of 1965, 20 U.S.C. § 1071-1146a

("HEA"), to encourage lenders to make student loans by paying interest subsidies and providing federal reinsurance against default. *See* 34 C.F.R. § 682.100 (1992).[1] Petitioners alleged that the Training Institute acted as agent for the lenders in arranging their GSLP loans and used fraudulent misrepresentations to procure petitioners' signatures on the loan documents. Petitioners sought a declaratory judgment that, because of the school's role in arranging these loans, the loans are subject to defenses arising from the school's misrepresentations. The common law of Georgia, like that of other states, provides that, where a seller acts as agent for a lender in arranging financing to pay for the seller's goods or services, the lender may be held responsible for misrepresentations made by the seller. *See* O.C.G.A. §§ 10-6-56, 10-6-60; *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113, 116 (1948). Petitioners also presented alternative theories for raising these defenses, but these alternative theories are not included in this petition.

Defendants moved to dismiss the agency claim under Fed. R. Civ. P. 12(b)(6) on the theory, among others, that the GSLP preempts any state laws that would make lenders responsible for misconduct by schools acting as their agents. The GSLP permits lenders to use schools as their agents for marketing loans, but does not require that they do so. If a lender chooses to use the school to perform the lender's responsibilities in the loan-making process, such as completing and having the borrower sign the promissory note, the GSLP regulations provide that the school is

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[1] In 1992, the GSLP was renamed the "Federal Family Education Loan Program." Pub. L. No. 102-325, § 411, 106 Stat. 510 (1992). The Circuit Court's opinion used the name of the program when the loans at issue were made, Appendix at 3a, and we follow the same practice in this petition.

considered to have "originated" the loan. *See* 34 C.F.R. §§ 682.200(b), 682.206(a), (b). While these "origination" regulations permit lenders to delegate loan making responsibilities to schools, they also indicate that "such a practice is discouraged," 41 Fed. Reg. 4499-4500 (1976), by explicitly limiting lenders' ability to rely on representations by schools that originate loans on their behalf. *See* 34 C.F.R. § 682.206(a)(2). Department of Education policy statements and regulations also warn that, if the school acts as the lender's agent or "originates" the loan, the lender and subsequent holders of the loan may be subject to defenses based on the school's misconduct.[2] Nonetheless, the district court accepted defendants' argument that the state common law rule that a principal is responsible for misrepresentations of its agent is preempted because, the court asserted, the agency relationship alleged by petitioners "is mandated by the HEA and federal law." Appendix at 21a.

On appeal, the Eleventh Circuit did not endorse the district court's conclusion that the HEA "mandated" that the school act as the lender's agent. Instead, in an unpublished opinion, the Circuit Court held that state law is preempted if it is based on conduct that is "mandated *or contemplated by the HEA*." *Id.* at 8a (italics added). Because federal law "expressly *permits* lenders to delegate lender functions to schools with which they

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[2]Letter from Acting Assistant Secretary Kenneth D. Whitehead to Hon. Stephen J. Solarz, May 19, 1988, quoted in *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 584-85 (D.C. Cir. 1994); *see also* 34 C.F.R. § 682.604(f)(2)(iii) (providing that students should be counseled that they cannot raise school-related defenses on a loan, "other than a loan made or originated by the school"); 55 Fed. Reg. 48327 (1990) (describing "longstanding view" that if an origination relationship exists, the school's failure to deliver services provides the student a defense).

enter into 'origination relationships,'" the Circuit Court concluded that "the Georgia law of agency and any other applicable state laws" are preempted to the extent they impose liability on loan holders for the "school's acts as purported agents of the lenders." *Id.* at 8a (italics added). In a footnote, the Circuit Court emphasized that state agency law claims are preempted even where, as here, the borrower alleges that the school had "originated" the loans within the meaning of federal law. *Id.* at 9a n.6.

REASONS FOR GRANTING THE WRIT

The pending petition for certiorari in *Armstrong v. Accrediting Council for Continuing Education & Training, Inc.*, No. 99-395, sets forth the principal reasons why this Court should grant certiorari to address the issue of whether federal law preempts state laws that allow borrowers to raise defenses based on the fraud or other misconduct by schools that arrange loans on behalf of lenders. We request that those arguments be considered in evaluating this petition as well, because the Eleventh Circuit's ruling below, like the District of Columbia Circuit's ruling in *Armstrong*, rests on the premise that state laws that protect borrowers from fraud and other abuses by schools acting on behalf of lenders are preempted simply because federal law permits schools to act on lenders' behalf -- a premise that is clearly contrary to this Court's preemption jurisprudence.

I.

A cardinal teaching of this Court's preemption jurisprudence is that a state's ability to regulate is not displaced merely because state law attaches legal consequences to conduct that is permitted by federal law. To the contrary, preemption requires an "actual conflict" that arises because "it is impossible to comply with both state and federal law," or because the state law "stands as an

obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Thus, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), this Court held that a negligence action that would impose liability on a truck manufacturer for failure to use brake equipment that was not required by federal law was not preempted because, in the absence of any federal requirement, there was no preemptive conflict. *Id.* at 289. In *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), this Court held that a state statute requiring employees to provide particular employment benefits to pregnant employees was not preempted by the federal Pregnancy Discrimination Act because compliance with both laws was possible and nothing in the Discrimination Act precluded states from imposing obligations that were more favorable to employees than those set forth in federal law. *Id.* at 291.

The Eleventh Circuit's preemption ruling below, like the ruling in *Armstrong*, 168 F.3d at 1370, is inconsistent with this principle. The Eleventh Circuit concluded that federal law displaced state agency law because the loan program "expressly contemplated" and "expressly permits" lenders to use schools as their agents. Appendix at 7a-8a. However, because federal law permits, but does not require, lenders to use schools as their agents, compliance with both state law and federal law is not impossible. In addition, there is no provision of federal law indicating a significant federal interest in lenders using schools as their agents, much less a federal interest in absolving lenders from any responsibility when their agents use fraudulent misrepresentations to procure loans.

The Eleventh Circuit's opinion asserts that "[a] majority of courts addressing the issue have determined that federal law preempts state law defenses to student loan enforcement which

impose liability based on a relationship between schools and lenders mandated or contemplated by the HEA." Appendix at 7a & n. 4. As support for this statement, the Eleventh Circuit cites three district court decisions; two of these decisions were vacated by the District of Columbia Circuit and the third decision, by the Southern District of West Virginia, held that state and federal law were in conflict because the court concluded that the conduct that triggered the state statute at issue was *required* by federal law -- not because the conduct at issue was "contemplated" by federal law.[3] The ruling by the Eleventh Circuit that federal law preempts state law merely because federal law "permits" schools to arrange loans for lenders (although it does not permit or endorse fraudulent misrepresentations by schools in this or any other context), has no support in the decisions of this Court and displaces an enormous body of state law that defines rights and obligations that are not addressed in federal law.

II.

This Court's decisions also make clear that preemption requires a statutory or regulatory text that mandates preemption

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[3]*See Tipton v. Secretary of Educ.*, 768 F. Supp. 540, 558 (S.D.W.Va. 1991) (concluding that state claim under West Virginia statute was preempted because the court believed that state statute attached liability to actions by banks that are "expressly dictated by the federal act and regulations"). The District of Columbia decisions are *Jackson v. Culinary Sch. of Washington*, 788 F. Supp. 1233, 1247 (D.D.C. 1992), *rev'd*, 27 F.3d 573 (D.C. Cir. 1994), *vacated*, 515 U. S.1139 (1995), *on reconsideration*, 59 F.3d 354 (D.C. Cir. 1995) (finding preemption based on the conclusion that federal law requires school's participation in preparation of loan instruments), and *Armstrong v. Accrediting Council for Cont. Educ. & Train., Inc.*, 832 F. Supp. 419 (D.D.C. 1993), *vacated and remanded*, 84 F.3d 1452 (D.C. Cir. 1996), a precursor to the District of Columbia Circuit decision that is the subject of Petition No. 99-395.

or at least establishes a federal interest that will be substantially frustrated by state law. *See Puerto Rico Consumer Affairs Dep't v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (no preemption where there is no text that can "plausibly be interpreted as *prescribing* federal preemption."); *Ray v. Atlantic Richfield Co.*, 435 U.S. 131, 172 (1978) (no preemption where agency has proposed, but has not adopted, regulations that might conflict with state law). In *Armstrong*, the District of Columbia Circuit identified no statutory or regulatory text as the basis for preemption but, instead, cited the decision by federal officials not to enforce a federal regulation as the source of a preemptive federal policy. *See* Petition No. 99-395 at 12-13, 15-16. In the decision below in this case, the Eleventh Circuit did identify a text as the basis for its ruling, namely, the GSLP regulation that "expressly permits lenders to delegate lender functions to schools with which they enter into 'origination relationships.'" Appendix at 8a (citing 34 C.F.R. §§ 682.200, 682.206(a), (b) (1998)). These permissive regulations, however, do not provide a basis for displacing state law. To the contrary, the regulations indicate that federal law *discourages* lenders from delegating their responsibilities to schools by providing that lenders may not rely on representations by schools that originate loans on their behalf. *See* 34 C.F.R. § 682.206(a)(2).

The only other basis for preemption identified by the Eleventh Circuit is the panel's suggestion that, because federal law encourages "the participation of lenders and guaranty agencies in the [GSLP] program," the common law of agency "and any other applicable state laws" that impose liability on lenders and guaranty agencies "based on the school's exercise of lending functions" are preempted because they frustrate the "'purposes and objectives of Congress.'" Appendix at 8a (quoting *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U. S. at

281). This rationale is inconsistent with this Court's decisions, which have repeatedly held that the existence of a federal program encouraging an activity does not immunize participants in the program from tort liability or other remedies under state law. Thus, this Court has held that the federal law promoting nuclear power does not implicitly preempt all remedies for those who are injured by exposure to hazardous materials, *Silkwood*, 464 U.S. at 257-58, and the federal interest in collecting on defaulted loans does not preempt state property laws that might handicap federal collection efforts. *United States v. Yazell*, 382 U.S. 341, 349-350 (1966). Similarly, the federal mandate to encourage lenders to make student loans does not support the conclusion that federal law immunizes lenders from responsibility for fraudulent conduct by their agents. Indeed, under the Eleventh Circuit's ruling, federal law provides a safe-harbor for fraud by providing that lenders have no liability for their agents' misconduct, and the borrowers, who are the intended beneficiaries of the loan program, are required to repay loans procured through misrepresentation by the lenders' agents. Nothing in the GSLP suggests that Congress intended to displace state law in this manner.

Because the Eleventh Circuit's preemption ruling rests on the longstanding regulations that permit lenders to delegate lender functions to schools, its ruling is more sweeping than the District of Columbia Circuit's holding in *Armstrong*. The District of Columbia Circuit's ruling presumes that the preemption of state law ended in 1992 when federal enforcement policy changed. *Armstrong*, 168 F.3d at 1370. Under the Eleventh Circuit's ruling, however, state agency law and similar laws continue to be preempted because the GSLP regulations that authorize "origination relationships" between schools and lenders have never been repealed. 34 C.F.R. § 682.206 (1998). The Eleventh

Circuit's conclusion that, because federal law permits certain conduct, it precludes states from protecting borrowers from fraudulent representations that occur in the course of that conduct, creates an enormous gap in the laws protecting student borrowers from abuses and should be reviewed by this Court.

CONCLUSION

This Court should issue a writ of certiorari to review the Eleventh Circuit's ruling that state agency law is preempted by the federal student loan program because federal law permits lenders to use schools as their agents in arranging loans.

Respectfully submitted,

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September 27, 1999

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Department of Education Guaranteed Student Loan Program Regulations 32a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No 98-8885

D. C. Docket No. 2:94-CV-150-AAA

EDDIE BARTELS, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

ALETHIA PINKNEY, Individually and on behalf of all others similarly situated,

Plaintiff.

SHIRLEY TRAVIS, Individually and on behalf of all others similarly situated; IRIS HULL Individually and on behalf of all others similarly situated; SHARON DAYS, Individually and on behalf of all others similarly situated; LEONIE SMART, Individually and on behalf of all others similarly situated; MARY L. MANLEY, Individually and on behalf of all others similarly situated; DORETHA YOUNG, Individually and on behalf of all others similarly situated; RUBY C. CARR Individually and on behalf of all others similarly situated; ALFREDA C. BANTUM, individually and on behalfofall others similarly situated; OCTAVIS ROBERSON, Individually and on behalf of all others similarly situated; IRIS MILLER; LINDA MOSLEY; MICHELE CROSS,

Plaintiffs-Appellants,

VERA BURSON,

Plaintiff,

versus

ALABAMA COMMERCIAL COLLEGE, INC., d.b.a.,

Riley Training Institute of Savannah, Waycross and Brunswick, Georgia,

Defendant,

RICHARD RILEY, Secretary, U.S. Department of Education, in his official capacity, HIGHER EDUCATION ASSISTANCE FOUNDATION; GEORGIA HIGHER EDUCATION ASSISTANCE CORPORATION; STUDENT LOAN MARKETING ASSOCIATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(June 29, 1999)

Before TJOFLAT and BIRCH, Circuit Judges and BRIGHT, Senior Circuit Judge.*

PER CURIAM:

Appellants represent a putative class of student loan borrowers seeking relief from enforcement of their loan repayment obligations. Appellants filed suit in federal court against the Riley Training Institute ("Riley" or "the school"), the Secretary of Education ("Secretary"), the Higher Education Assistance Foundation ("HEAF"), the Georgia Higher Education Assistance Corporation ("GHEAC "), and the Student Loan Marketing Association (" Sallie Mae"). They alleged fraud against Riley and sought on various grounds to assert the school's fraud as a defense to loan collection by the remaining defendants, current holders of the loans. They also asserted that certain of the Secretary's wage garnishment procedures violate due process.

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* Honorable Myron H Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

After granting default judgment against Riley, the district court dismissed all claims against the Secretary, HEAF, GHEAC, and Sallie Mae (collectively "the non-school defendants") under Fed. R. Civ. P. 12(b)(6). The court determined that appellants could not assert the school's fraud as a defense to loan collection by the non-school defendants. *Bartels v Alabama Commercial College*, 918 F. Supp. 1565, 1569-73 (S.D. Ga. 1995). It also determined that the Higher Education Act ("HEA") deprived the court of jurisdiction over the due process claims against the Secretary. *Id.* at 1573-74.

Appellants appeal the dismissal of the claims against the non-school defendants. We affirm the dismissal of the fraud-related claims against the non-school defendants, but reverse the dismissal of the due process claims against the Secretary. We remand the due process claims to the district court for a determination of whether the claims are "ripe" for judicial review and, if necessary, consideration on the merits.

I. BACKGROUND

Appellants ("the borrowers") obtained student loans under the federal Guaranteed Student Loan Program ("GSLP")[1] to attend Alabama Commercial College, d/b/a the Riley Training Institute, between 1988 and 1991. Riley operated as a licensed and accredited vocational school from 1988 to 1992, offering twenty-six-week courses purporting to train and qualify students for high-paying jobs in technical fields. The borrowers discovered that the courses provided by Riley failed to provide students with adequate training or qualifications to obtain jobs in the advertised fields. The school also failed to deliver on promises to provide job placement services for students after graduation.

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[1] Congress enacted the GSLP as part of the Higher Education Act of 1965. *See* Higher Education Act of 1965, Pub. L. No. 89-329, §§ 421 *et. seq.*, 79 Stat 1219 (1965). For the laws and regulations governing the GSLP, see 20 U.S.C. §§ 1071 *et. seq.* (1994 & Supp. II 1996) and 34 C.F.R. § 682.100 *et. seq.* (1998).

The borrowers eventually defaulted on their student loans. Various loan guaranty agencies paid claims on the loans pursuant to the terms of reinsurance agreements previously executed in accordance with the provisions of the GSLP. *See* 20 U.S.C. § 1078 (1994). The guaranty agencies and the Secretary initiated loan collection proceedings against the borrowers. Borrowers received wage garnishment notices from the Secretary, and some borrowers responded to the notices by borrowing money to repay the loans in their entirety.

The borrowers filed suit in United States District Court in the Southern District of Georgia on August 17, 1993. In an amended complaint filed November 1, 1995, the borrowers asserted numerous claims against Riley based on the school's failure to provide adequate training and job placement services, including fraud, breach of contract, ex delicto contract breach, negligence per se, and unfair trade practices. The borrowers sought to interpose the school's conduct as a defense to loan collection by the non-school defendants, and offered several theories to that end. The borrowers asserted that the school acted as an agent of non-school defendants in procuring loans for the borrowers, and that under federal regulations and the Georgia law of agency, the non-school defendants were liable for the school's conduct.

The borrowers also asserted that the FTC Holder Rule, 16 C.F.R. § 433.2, subjected the non-school defendants to claims and defenses the borrowers might assert against the school.

Finally, the borrowers asserted that certain of the Secretary's wage garnishment procedures violated due process in that they failed to afford borrowers adequate means of challenging garnishment.

Among other things, the borrowers requested a refund of their loan payments, rescission of the loan contracts, an injunction against loan collection, and a declaration that the Secretary's wage garnishment procedures violate due process.

The district court entered a default judgment against Riley after Riley failed to answer the complaint. Riley has since entered into bankruptcy.

The non-school defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The district court granted the motion and dismissed all claims against the non-school defendants. *Bartels*, 918 F. Supp. at 1568. The court rejected the borrowers' theories for holding the non-school defendants liable for the school's conduct. *Id.* at 1569-73. It determined that the borrowers had failed to state a claim under the Georgia law of agency. *Id.* at 1571. It determined that the HEA mandated the close relationship between the school and the non-school defendants, and that federal law therefore preempted the agency claims based on that relationship. *Id.* The court also determined that the borrowers failed to state a claim for relief under the FTC Holder Rule.[2] *Id.* at 1570-71. It determined that the borrowers had no rights under

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[2] The FTC Holder Rule states that it

> is an unfair or deceptive act or practice within the meaning of Section 5 of [the Federal Trade Commission Act, 15 U.S.C. § 41 *et. seq.*,] for a seller, directly or indirectly, to:
>
> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(1998).

the Holder Rule where the loan contracts did not include the notice provision required by the rule. *Id.* Finally, the court determined that the HEA's "anti-injunction" provision[3] deprived the court of jurisdiction over the borrowers' due process claims. *Id.* at 1573-74.

This appeal followed.

II. ISSUES ON APPEAL

The borrowers raise the following contentions on appeal:

1. The district court erred in determining that the HEA preempted the borrowers' claim under the Georgia law of agency.

2 The district court erred in determining that the borrowers had no rights under the FTC Holder Rule.

3. The district court erred in determining that the HEA's "anti-injunction" provision deprived the district court of jurisdiction over the borrowers' due process claims.

We reject the first two contentions and affirm the dismissal of the claims against the non-school defendants brought under the Georgia law of agency and the FTC Holder Rule. We agree with the third contention and remand the due process claims for further proceedings in the district court.

III. DISCUSSION

A. Standard of Review

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[3] 20 U.S.C.§ 1082(a)(2) (1994). The provision reads in part:

[T]he Secretary may-

....

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, ... but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control....

This court reviews *de novo* grants of motions to dismiss under Fed. R.Civ. P. 12(b)(6). *See McKusick v City of Melbourne*, 96 F. 3d 478, 482 (11th Cir 1996). The court of appeals will affirm a Rule 12(b)(6) dismissal where it appears the plaintiffs can prove no set of facts in support of their claim entitling them to relief. *See Hartford Fire Ins. Co. v California*, 509 U.S. 764, 811 (1993).

B. The Dismissal of the Borrowers' Claims under the Georgia Law of Agency

On appeal, the borrowers assert that the district court erred in determining that federal law preempts their claims under the Georgia law of agency. They contend that the HEA does not require schools to act as agents of lenders and that imposing liability on the non-school defendants for the school's role as agent does not conflict with the HEA.

We view the preemption issue as a close one. Nevertheless, we conclude that federal law preempts the Georgia law of agency and any other applicable state laws to the extent that they impose liability on the non-school defendants for the school's acts as the purported agent of the lenders.

A majority of courts addressing the issue have determined that federal law preempts state law defenses to student loan enforcement which impose liability based on a relationship between schools and lenders mandated or contemplated by the HEA.[4] The borrowers' claims under the Georgia law of agency

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[4] *See Armstrong v. Accrediting Council for Cont. Educ. & Train., Inc.*, 832 F. Supp. 419, 430-31 & n.25 (D.D.C. 1993) (holding that the HEA preempted state law defenses to loan enforcement based on a school's preparation of the loan application, specification of the type of loan, determination of the loan amount, preparation of the promissory note, selection of the lender, and presentation of terms of loans to borrowers), *vacated on other grounds*, 84 F.3d 1452, 1996 WL 250412 (D.C. Cir 1996); *Jackson v. Culinary Sch. of Washington*, 788 F. Supp. 1233, 1247 (D.D.C. 1992) (holding that the HEA preempts state law defenses to loan enforcement based on a school's participation in preparation of loan instruments), *rev'd on other.grounds*, 27 F.3d 573 (D.C. Cir. 1994); *Tipton v.*

seek to do just that -- impose liability on the non-school defendants based on a relationship between the school and the lenders expressly contemplated, if not mandated, by the HEA. The lenders assert that the school acted as an agent of the lenders by exercising lender functions in procuring loans for the borrowers.[5] Yet the GSLP expressly permits lenders to delegate lender functions to schools with which they enter into "origination relationships." See 34 C.F.R. §§ 682.200; 682.206(a) (b) (1998). Allowing the borrowers' claims would penalize lenders for participating in the GSLP program according to its express terms. This would tend to discourage participation of lenders and guaranty agencies in the program. *Cf. Jackson,* 788 F. Supp. at 1247 ("[A] state law claim cannot lie to the extent that it would penalize participants in the GSL[P] ... for following Congressional directives.") Therefore, the Georgia law of agency and any other applicable state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U. S. 272, 281 (1987), to the extent that they impose liability on the non-school defendants based on the school's exercise of lending functions.

Secretary of Educ., 768 F. Supp. 540, 557-58 (S.D.W.Va. 1991) (holding that the HEA preempts state law defenses to loan enforcement based on a school supplying a lender with loan documents or conditioning a loan upon attendance at a particular school). *But see Moran v. Markerdowne Corp.*, 976 F. Supp. 301, 318-19 (D.N.J. 1997) (holding that the HEA does not preempt state law defenses to the extent they provide borrowers with protection equivalent to that offered by FTC Holder Rule).

[5] The borrowers allege that the school determined who received loans and the amount of the loans, prepared and presented loan forms to borrowers, assisted borrowers in completing forms, collected information about borrowers, verified the identity of borrowers, and obtained the borrowers' signatures on promissory notes.

The district court did not err in determining that federal law preempted the borrowers' claims under the Georgia law of agency. Accordingly, we affirm the dismissal of those claims.[6]

C. The Dismissal of the Borrowers' Claims under the FTC Holder Rule

On appeal the borrowers contend that the district court erred in determining that they had no rights under the FTC Holder Rule. They contend that the Holder Rule subjects the non-school defendants to claims and defenses the borrowers might assert against the school despite the absence from the loan contracts of the notice provision required by the rule. They base their claim on the common law principle that contracts incorporate the law in force at the time of the agreement. *See United Van Lines, Inc. v. United States*, 448 F.2d 1190, 1195 (D.C Cir. 1971) ("Because the regulation was in existence at the time [the partyl entered on performance, it became, in effect, a part of the contract between the parties").[7]

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[6] In their complaint the borrowers asserted that the Secretary's policy against enforcing school originated loans barred the non-school defendants from collecting on the borrowers' loans. The district court dismissed this claim for the reason that the Secretary never promulgated that policy as a binding administrative rule. *Bartels*, 918 F. Supp. at 1569-70.

We view this origination claim as distinct from the borrowers' claim under the Georgia law of agency in that it relies on federal law as opposed to state law. The borrowers do not present the dismissal of the origination claim as a distinct point of error. However, their appeal relies heavily on arguments concerning the effects of an origination relationship on the enforceability of loans under the Secretary's origination policy. To the extent that the borrowers incorporate the origination claim into their agency claim, we agree with and affirm the district court's disposition of the origination claim.

[7] The borrowers also assert that the non-school defendants' failure to ensure inclusion of the notice provision in the loan contracts incurred liability under Georgia tort law. *See. e.g., Peterson v. First Clayton Bank & Trust Co.*, 447 S.E. 2d 63, 67 (Ga. App. 1994) (stating that the violation of a legal duty incident to and created by contract incurs tort liability). The borrowers did not assert Georgia tort law as a basis for liability in the complaint. Consequently, we will

The FTC Holder Rule seeks to protect consumers by requiring that any consumer credit contract or purchase money loan for the sale or lease of goods or services contain a notice provision that the holder of the contract is subject to claims and defenses the consumer might assert against the seller. *Armstrong*, 832 F. Supp. at 431. Every court addressing the issue has determined that the Holder Rule confers no rights or obligations on parties to student loan contracts where the contracts lack the required notice provision.[8]

We agree with these decisions. The omission of the notice provision from the loan contracts deprived the borrowers of any rights they might have had under the Holder Rule. The district court did not err in determining that the borrowers could not hold the non-school defendants liable for the school's conduct under the Holder Rule. Accordingly, we affirm the dismissal of the claims against the non-school defendants brought under the Holder Rule.

D. The Dismissal of the Due Process Claims Against the Secretary

On appeal, the borrowers contend that the district court erred in determining that the HEA's "anti-injunction" provision deprived the court of jurisdiction over the borrowers' due process claims. Conceding that the court lacked jurisdiction over their claims for injunctive relief, they argue that the HEA provision did not deprive the court of jurisdiction over their claims for declaratory relief.

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not now consider this claim *See Bok v. Mutual Assur. Inc.*, 119 F.3d 927, 929 (11th Cir. 1997) ("Generally, this Court will not consider issues that the appellant failed to raise below.").

[8] *See Williams v. National Sch. of Health Technology, Inc.*, 836 F. Supp. 273, 282-83 (E.D. Pa. 1993), *affd*, 37 F.3d 1491 (3rd Cir. 1994); *Armstrong*, 832 F. Supp. at 432; *Jackson*, 788 F. Supp. at 1251; *Vietnam Veterans of Am. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 964-65 (D. Del. 1986).

The HEA provides that "no attachment, injunction, garnishment, or other similar process, mesne, or final shall be issued against the Secretary ..." 20 U.S.C. § 1082(a)(2)(1994). The plain language of this provision deprives courts of jurisdiction over claims for injunctive relief against the Secretary. However, anti-injunction clauses in federal statutes do not as a rule preclude declaratory relief. *See Thomas v. Bennett*, 856 F. 2d 1165, 1168 (8th Cir.1988) (holding it proper for the district court to consider declaratory relief against Secretary); *Ulstein Maritime, Ltd. v. United States* 833 F.2d 1052, 1055 (1st Cir. 1987) (stating that declaratory relief is a "milder form" of injunctive relief and is frequently available where injunctive relief is unavailable). Anti-injunction clauses only preclude declaratory relief where declaratory relief amounts to the equivalent of injunctive relief. *Cf. Expedient Serv. Inc. v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980) (holding that statutory provision against injunctive relief barred claim where plaintiffs sought relief equivalent to injunctive relief).

The district court determined that the HEA deprived the court of jurisdiction over the borrowers' claims for declaratory relief, viewing the claims as the equivalent of claims for injunctive relief. *Bartels*, 918 F. Supp. at 1574. The court determined that the borrowers "only seek to enjoin the Secretary from collecting on their student loans." *Id.* We disagree with this conclusion of the district court. The borrowers sought a declaration that certain of the Secretary's wage garnishment procedures violate due process. This declaratory relief does not amount to the equivalent of injunctive relief. Granting this relief would not prevent the Secretary from collecting on loans altogether; it would only require the use of proper and constitutional garnishment and other collection measures. Consequently, the HEA's "anti-injunction" provision does not deprive the court of jurisdiction to consider the appropriateness of declaratory relief on the borrowers' due process claims.

As an alternative ground for affirming the dismissal of the due process claims, the Secretary asserts that the borrowers have

not presented a "ripe" claim for judicial review. The Secretary claims that the garnishment notices received by borrowers were only "preliminary" and that the Secretary has not garnished the wages of any named borrowers. The Secretary asserts that the borrowers cannot challenge the constitutionality of wage garnishment procedures until the borrowers suffer actual garnishment.

The borrowers assert several due process violations in the Secretary's wage garnishment procedures. They assert that the Secretary gives borrowers insufficient time to request a garnishment hearing. This claim amounts to challenging the facial validity of § 1095a(b) of the wage garnishment statute, which gives borrowers fifteen days from the mailing of garnishment notices to request a pregarnishment hearing. See 20 U.S.C. § 1095a(b)(1994). They also assert that the Secretary denies the borrowers their statutory rights to a hearing and repayment schedule, *see* 20 U.S.C. § 1095a(a)(4)(5) (1994), by locating hearings too far away for borrowers to attend, failing to make an administrative record of hearings, and sending notices threatening wage garnishment without informing borrowers of their rights to a hearing and repayment schedule.[9]

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[9] The notices read:

IMPORTANT ANNOUNCEMENT: THE EMERGENCY UNEMPLOYMENT COMPENSATION ACT OF 1991 (P.L. 102-164), AMENDED THE HIGHER EDUCATION ACT OF 1965 TO INCLUDE SECTION 488(A) ... TO REQUIRE EMPLOYERS, WHO EMPLOY AN INDIVIDUAL WHO IS NOT REPAYING THEIR DEFAULTED STUDENT LOAN, TO BEGIN DEDUCTING TEN PERCENT OF THE DEBTOR'S TAKE-HOME PAY IN ORDER TO RECOVER THE ENTIRE BALANCE DUE. UNDER THIS AUTHORITY, NO LEGAL ACTION IS REQUIRED TO OBTAIN ADMINISTRATIVE COOPERATION FROM THE EMPLOYER. THIS NOTICE IS INTENDED AS AN ADVISORY TO ENCOURAGE THOSE, NOT CURRENTLY PAYING, TO MAKE ARRANGEMENTS TO VOLUNTARILY REPAY THEIR STUDENT LOANS BEFORE MORE SERIOUS ACTIONS ARE TAKEN

The district court did not address the ripeness issue due to its determination that it lacked jurisdiction over the due process claims. We cannot decide the ripeness issue on the record we have before us on appeal. The district court should resolve the ripeness issue, as it may require consideration of evidence beyond the allegations of the complaint. Accordingly, we remand the due process claims to the district court for resolution of the ripeness issue and, if necessary, the merits of the due process claims, in light of the complaint and any additional evidence that may prove necessary.

In summary, the district court erred in determining that the HEA deprived the court of jurisdiction over the borrowers' requests for declaratory relief on the due process claims. We remand those claims to the district court.

IV. CONCLUSION

We affirm the dismissal of the borrowers' claims against the non-school defendants based on the Georgia law of agency and the FTC Holder Rule. We reverse the dismissal of the borrowers' due process claims against the Secretary's wage garnishment procedures based on the HEA's anti-injunction provision. We remand those claims for resolution of whether the claims are "ripe" for judicial review and, if necessary, consideration on the merits.[10]

AFF1RMED, REVERSED and REMANDED.

AGAINST THEM.

(Dist. Ct. No. 94-CF-150, R. 1, Exh. D).

[10] As to any other extant issues relating to the fraud or breach of contract claims against the non-school defendants, we adopt the disposition and reasoning of the district court.

FILED, Dec. 15, 1995

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

EDDIE BARTELS, et al.,

Plaintiffs,

v.

ALABAMA COMMERCIAL COLLEGE, Inc. d/b/a Riley Training Institutes of Savannah, Waycross and Brunswick, Georgia, Defendant; RICHARD RILEY, Secretary, U. S. Department of Education, in his official capacity, Defendant; HIGHER EDUCATION ASSISTANCE FOUNDATION, Defendant; GEORGIA HIGHER EDUCATION CORPORATION, Defendant; and STUDENT LOAN MARKETING ASSOCIATION,

Defendants.

CIVIL ACTION NO. CV294-150

ORDER

Defendants, Student Loan Marketing Association, the Higher Education Assistance Foundation, the Georgia Higher Education Assistance Corporation, and the Secretary of the United States Department of Education, Richard Riley (collectively referred to as the "non-school Defendants"), have each filed a Motion to Dismiss Plaintiffs' amended complaint. For the reasons discussed below, the non-school Defendants' motions will be **GRANTED**.

FACTS

Plaintiffs are a putative class of former students of Alabama Commercial College, Inc., d/b/a the Riley Training Institutes of Savannah, Waycross, and Brunswick, Georgia. From September of 1988 to November of 1990, these schools allegedly recruited the Plaintiffs, induced them to sign up for federally guaranteed student loans, and then failed to provide the promised quality of education or job placement.

Plaintiffs' amended complaint names as Defendants, Alabama Commercial College, Inc. d/b/a Riley Institute ("Riley Institute"), the Secretary of the United States Department of Education, Richard Riley ("Secretary Riley"), the Higher Education Assistance Foundation ("HEAF"), the Georgia Higher Education Assistance Corporation ("GHEAC"), and the Student Loan Marketing Association ("Sallie Mae"). Riley Institute is a now-defunct corporation that provided vocational training in Southeast Georgia. Secretary Riley is responsible for implementing and overseeing the Guaranteed Student Loan Program (now called the Federal Family Education Loan Program, or "FFEL") and other related educational programs. GHEAC and HEAF guaranteed some of the Plaintiffs' student loans and are allegedly assignees of some of these loans. Sallie Mae is in the business of buying student loans in the secondary market and currently holds some of those loans.

In their amended complaint, Plaintiffs seek rescission of their loan contracts, declaratory and injunctive relief, actual and punitive damages, attorneys' fees and costs. In Count One of their complaint, Plaintiffs are suing Riley Institute, GHEAC, HEAF, and Sallie Mae for fraud. In Counts Two and Three, Plaintiffs are suing all the Defendants for breach of contract and for violations of the Uniform Deceptive Trade Practices Act. In Count Four, Plaintiffs are suing Riley Institute, GHEAC, and HEAF for the tort of ex delicto contract breach. Finally, in Count Five, Plaintiffs are suing Secretary Riley for Violations of Due Process.

DISCUSSION

I. The Standard for Evaluating a Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a complaint on the ground that the plaintiff has failed to state a claim upon which relief can be granted. A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of a 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true, *e.g.*, *United States v. Gaubert,* 499 U.S. 315, 327, 111 S. Ct. 1267, 1276, 113 L. Ed. 2d 335 (1991); *Powell v. Lennon,* 914 F.2d 1459, 1463 (11th Cir. 1990), and construe them in the light most favorable to the plaintiff. E.g., *Sofarelli Pinellas v. County,* 931 F.2d 718, 721 (11th Cir. 1991).

II. Can Count One of Plaintiffs' Complaint Survive Defendants' Motions to Dismiss?

In Count One of their complaint, Plaintiffs assert a cause of action of fraud against Riley Institute, GHEAC, HEAF, and Sallie Mae. Under Rule 9(b) of the Federal Rules of Civil Procedure, a plaintiff must state "the circumstances of fraud . . . [in his complaint] . . . with particularity." Fed. R. Ci Pro. 9(b). A complaint satisfies Rule 9(b) if it alleges the date, time, or place of the alleged fraud or if it alleges alternative means sufficiently detailed to connect the allegations to the defendant[s]. *Durham v. Business Management Associates,* 847 F.2d 1505, 1511 (11th Cir. 1988). Plaintiffs do not cite any direct actions of GHEAC, HEAF, or Sallie Mae, but, rather, only describe the allegedly fraudulent actions of Riley Institute. In an attempt to connect Defendants, GHEAC, HEAF, and Sallie Mae, to the conduct of Riley Institute, Plaintiffs claim that 1) Riley Institute and GHEAC, HEAF, and Sallie Mae stood in an origination relationship under 34 C.F.R. § 682.200, 2) that the promissory notes signed by Plaintiffs implicitly include the notice required by the FTC Holder Rule (the "FTC Holder Rule notice"), 3) that GHEAC, HEAF, and Sallie

Mae are assignees of an integrated, mutually dependent contract with Riley Institute and its students, and 4) that GHEAC, HEAF, and Sallie Mae engaged in an agency/joint venture relationship with Riley Institute whereby the non-school Defendants aided and abetted Riley Institute in the procurement of Plaintiffs' student loans.

A. Would the Existence of an Origination Relationship Allow Count One to Survive Defendants' Motion to Dismiss?

Plaintiffs first predicate their fraud count upon an alleged origination relationship under 34 C.F.R. 682.200 between the school and the lenders.[1] Plaintiffs claims that such a relationship would enable them to assert against GHEAC, HEAF, and Sallie Mae the defenses to the student loan contract that could be asserted against Riley Institute.

In support of their assertion, Plaintiffs cite statements of the Secretary of Education from 1988 to 1992 to Congressmen and in briefs submitted to various courts. In these statements, the

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[1] The federal regulations effective when Plaintiffs obtained their loans defined an origination relationship to be:

> A special relationship between a school and a lender, in which the lender delegates to the school, or to an entity or individual affiliated with the school, substantial functions or responsibilities normally performed by lenders before making loans. In this situation, the school is considered to have "originated" a loan made by the lender. The Secretary [of Education] determines that "origination" exists if, for example --
>
> > (1) A school determines who will receive a loan and the amount of the loan; or
> > (2) The lender has the school verify the identity of the borrower or complete forms normally completed by the lender.

34 C.F.R. § 682.200 (1989).

Secretary stated that when an origination relationship existed and when the loans were wholly or partially unenforceable against the student borrowers, the Department of Education's policy was to forbear enforcement of the loans. *See e.g.*, Letter from Dept. of Educ. Deputy Assistant Secretary for Student Fin. Assistance, Dewey L. Norman, to W.N. Kirby, Comm'r of Educ., Texas Educ. Agency, of 7/17/88 (Pl['s] Response at Ex. 11); Letter from Dept. of Educ. Acting Assistant Secretary Kenneth Whitehead, to Congressman Stephan J. Solarz, 5/19/88 (Pl['s] Response at Ex. 10); *Armstrong v. Accrediting Council,* 832 F. Supp. 419, 433 (D.D.C. 1993)(describing Secretary's Brief in Support of its Motion to Dismiss); *Williams v. Nat'l Sch. of Health Technology,* 836 F. Supp. 273, 284-85 (E.D.Pa. 1993)(same).

While this is an issue of first impression in the Eleventh Circuit, courts in other jurisdictions have held that such a theory cannot be used against third parties like GHEAC, HEAF, and Sallie Mae. In reaching its decision, these courts have reasoned that the Secretary's statements were never promulgated as a rule under § 553 of the Administrative Procedure Act ("APA"). *See, e.g., Williams,* 836 F. Supp. at 284-85 (E.D. Pa. 1993). The Court agrees, for federal agencies must comply with the APA's procedural requirements for rulemaking. *Chrysler Corp. v. Brown,* 441 U.S. 281, 303, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) citing *Morton Ruiz,* 415 U.S. 199, 232, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). "Although an agency may choose to bind itself in an informal manner, it cannot regulate third parties other than by utilizing the mechanisms of the APA." *Williams,* 836 F. Supp. at 285. Thus, the existence of an origination relationship between the school and the lenders would not allow Count One to survive the Defendants' Motion to Dismiss.

B. Is the Notice Required by the FTC Holder Rule Implicitly Included in the Promissory Notes Signed By Plaintiffs?

Plaintiffs next claim that Defendants, GHEAC, HEAF, and Sallie Mae, may be sued for fraud because the notice required by 16 C.F.R. § 433.2, the Federal Trade Commission Holder Rule

(the "FTC Holder Rule"), is implicitly included in their promissory notes.[2] Even assuming that the FTC Holder Rule applies to student loan transactions, a plaintiff has no rights under the rule if the notice is omitted from the contract. See *Armstrong v. Accrediting Council,* 832 F. Supp. 419, 432 (D.D.C. 1993); *Williams,* 836 F. Supp. at 283 (citing *Vietnam Veterans of America Inc. v. Guerdon Industries, Inc.,* 644 F. Supp. 951, 964-65 (D.Del. 1986). Furthermore, there is no private cause of action under the FTC Holder Rule. *Williams,* 836 F. Supp. at 283; *Heastie v. Community Bank of Greater Peoria,* 727 F. Supp. 1133, 1139, opinion supplemented, 727 F. Supp. 1140 (N.D. Ill. 1989). Rather, enforcement of the rule is the sole province of the Federal Trade Commission. *Holloway v. Bristol-Myers Corp.,* 158 U.S. App. D.C. 207, 485 F.2d 986, 1002 (D.C. Cir. 1973).

Plaintiffs nonetheless argue that state law implies the FTC Holder Rule notice into their promissory notes with the Defendants. In support of their claim, they cite the legal proposition that "laws which exist at the time and place of making of a contract, enter into and form a part of it." *See Walter v. Orkin*

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[2] The FTC Holder Rule states that "it is an unfair or deceptive act or practice within the meaning of section 5 of [the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*,] for a seller, directly or indirectly, to:

> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2.

Exterminating Co., 192 Ga. App. 621, 622, 385 S.E.2d 725 (1989) (citations omitted). This argument fails because no court in this nation has found that its state's laws implicitly include the notice in contracts made in that state or under its laws.[3] Accordingly, the FTC Holder Rule is not implicitly included in Plaintiffs' student loan contracts.

C. Are GHEAC, HEAF, and Sallie Mae Assignees of an Integrated, Mutually Dependent Contract?

Plaintiffs also assert that their fraud claim is supported by GHEAC, HEAF, and Sallie Mae's alleged status as assignees of an integrated, mutually dependent contract with Riley Institute and its students. No court in the nation has recognized this theory in the student loan context. Neither should this Court, for under the Higher Education Act ("HEA"), student loans are structured as two separate transactions. *Williams,* 836 F. Supp. at 282 (citing 20 U.S.C. § 1085*)*. Indeed, one transaction is a contract between the school and the student for educational services, and another transaction is between the student and the lender for financial services.

Furthermore, under Georgia law, a mutually dependent contract must be between the same parties. *Moran v. NAV Services,* 189 Ga. App. 825, 826, 377 S.E.2d 909 (1989). In this case, the contracts claimed by Plaintiff to be mutually dependent are not between the same parties. For instance, there are contracts between Riley Institute and the students, as well as contracts between the students and the lenders. There are also guaranty

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[3] Athough it is not helpful in this action, Congress has since attempted to afford relief to students who obtain loans after enrolling in questionable schools. Title 20, Section 1082(m)(1), of the United States Code, now requires the Department of Education to develop a common loan application form and promissory note to be used by "the Secretary, in cooperation with representatives of guaranty agencies, lenders, and all organizations involved in student financial assistance." 20 U.S.C. § 1082(m)(1) (1995 Supp.). This form, which went into effect in 1994, incorporates the notice required by the FTC Holder Rule. *See Bartels v. Alabama Commercial College,* 54 F.3d 702, 705 n.3 (11th Cir. 1995).

agreements between the lenders and the guaranty agencies, GHEAC and HEAF (the "guaranty agencies"), whereby GHEAC or HEAF guarantees to the lenders that the loans will be paid. Additionally, there are reinsurance agreements between Secretary Riley and the guaranty agencies whereby Secretary Riley promises to reimburse the guaranty agencies as long as they attempt, with due diligence, to collect on a defaulted loan. Thus, for these reasons, GHEAC, HEAF, and Sallie Mae are not assignees of an integrated, mutually dependent contract.

D. Can Plaintiffs' Assertion of an Agency/Joint Venture Relationship Allow Count One of the Amended Complaint to Survive Defendants Motions to Dismiss?

Plaintiffs' final theory in support of their Count alleging fraud is that GHEAC, HEAF, and Sallie Mae engaged in an agency/joint venture relationship whereby the non-school defendants aided and abetted Riley Institute in the procurement of student loans. Plaintiffs state that GHEAC, HEAF, and Sallie Mae acted as agents of Riley Institute by "obtaining the students' signatures on the student loans." (Pl[s'] amended compl. at P 119). Plaintiffs further state that GHEAC, HEAF, and Sallie Mae "benefitted from their agent/joint venturers' actions in that they received payments for the federally guaranteed loans they made to the students." (Pl[s'] amended compl. at P 120).

The close relationship alleged by Plaintiffs is mandated by the HEA and federal law. *See, e.g.*, 20 U.S.C. § 1078(a)(2)(requiring a school to provide information to the lender concerning a student's estimated cost of attendance, his estimated financial assistance and a schedule for the disbursement of loan proceeds); 20 U.S.C. § 1077a (describing permitted interest rates); 20 U.S.C. § 1092 (requiring schools to inform students about the details of federal student loans). As such, Plaintiffs' claim of an agency/joint venture relationship conflicts with the purposes and procedures of the HEA and is, thus, preempted by it. *See Tipton v. Secretary of Educ. of U.S.*, 768 F. Supp. 540, 558 (D.W.Va. 1991)(finding a plaintiff's claim preempted by 20

U.S.C. § 1078(a)(2)).[4] Thus, Plaintiffs cannot assert an agency/joint venture relationshIp.

For the above reasons, Plaintiffs have alleged no theory that connects GHEAC, HEAF, or Sallie Mae to Riley Institute's allegedly fraudulent acts. Consequently, Count I cannot survive GHEAC's, HEAF's, and Sallie Mae's Motions to Dismiss.

III. Can Count Two of Plaintiffs' Amended Complaint, Alleging Breach of Contract, Survive Defendants' Motion to Dismiss?

In Count Two of their amended complaint, Plaintiffs are suing Riley Institute, GHEAC, HEAF, Sallie Mae, and Secretary Riley for breach of contract. As a preliminary matter, a breach of contract action cannot be maintained against a defendant unless there is a contract. Here, there is no contract between the Plaintiffs and GHEAC, HEAF, Sallie Mae, or Secretary Riley. Plaintiffs beg the Court to find a contract exists, based on theories of an origination relationship forbearance policy, of an implicit inclusion in their promissory notes of the FTC Holder Rule notice, of an integrated, mutually dependent contract theory, and of an agency/joint venture theory. Because the Court has already dismissed those theories as they relate to GHEAC, HEAF, and Sallie Mae, the theories against these same Defendants are also dismissed in this Count. In like manner, in relation to their suit against Secretary Riley, Plaintiffs' theories of an implied FTC Holder Rule notice, of an integrated, mutually dependent contract, and of an agency/joint venture theory are identical to the theories used against GHEAC, HEAF, and Sallie Mae. Plaintiffs' origination relationship forbearance theory, however, is different from that asserted against GHEAC, HEAF, and Sallie Mae

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[4] Because the Court will dismiss Plaintiffs' fraud claim to the extent it is asserted against GHEAC, HEAF, and Sallie Mae, it is unnecessary to consider Sallie Mae's arguments concerning the Statute of Limitations. Neither does the Court need to consider GHEAC's argument that promises relating to future events are not actionable.

because Plaintiffs intend for the Secretary to be bound by his own assertions. Thus, it only needs to be determined whether Secretary Riley can be sued for breach of contract under Plaintiffs' theory of an origination relationship forbearance policy.

As stated previously, from 1988 to 1992, the Secretary of Education made statements in letters and in memoranda to courts that when an origination relationship existed and when the loans were wholly or partially unenforceable against the student borrowers, the Department of Education would not seek enforcement of a student loan. At most, these assertions were an informal policy,[5] for only substantive rules, promulgated according to § 553 of the APA, have the force and effect of law. *Batterton Francis,* 432 U.S. 416, 425 n.9, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977); *Smith v. Russellville Production Credit Ass'n,* 777 F.2d 1544, 1547-48 (11th Cir. 1985). In this regard, this case is very similar to the decision of the former Fifth Circuit, Unit B, in *United States v. Harvey,* 659 F.2d 62 (5th Cir. Unit B, October 15, 1981).[6] In Harvey, the appellants sought to enjoin the foreclosure of deeds used as security in a loan with the Veterans Administration ("VA"). In support of their contention, the appellants argued that the VA failed to service loan accounts properly, according to its manual. *Id.* The court found that the VA manual was merely an informal policy and, consequently, did not "create substantive rights in the mortgagor enforceable in federal court." *Id.* at 65-66. Later, in *Bright v. Nimmo,* 756 F.2d 1513, 1516 (11th Cir. 1986), the Eleventh Circuit applied the reasoning of Harvey to find that the VA manual did not confer a private cause of action against the Veterans Administration and/or a

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[5] Plaintiffs argue that the Secretary's assertions were more than an informal policy because, at one time the Department of Education intended to codify it. *See 55 Fed. Reg. 48327* (No 20, 1990). The Department, however, later decided not to codify the policy. *See* 57 Fed. Reg. 60304 (Dec. 19, 1992).

[6] Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in the Eleventh Circuit. *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982).

private lender. The instant case is very similar to the actions in Harvey and in Bright, in that it concerns an informal policy and the issue of whether that policy may be used in defense of a loan obligation. It only follows, then, that the Secretary's assertion may not be used to cancel Plaintiffs' student loan debts.

Further, contrary to Plaintiffs' warning, the Court's holding in the present action does not allow Secretary Riley to disregard his own policies. The Secretary's policy was that the Department of Education would refrain from trying to enforce unenforceable loans, not that an origination relationship creates a private cause of action for breach of contract. *See Jackson v. Culinary Sch. of Washington,* 307 U.S. App. D.C. 123, 27 F.3d 573, 585 (D.C. Cir. 1994), *vacated on other grounds*, *U.S.* , 115 S. Ct. 2573, 132 L. Ed. 2d 824 (1995).[7] Thus, an origination relationship forbearance theory cannot be asserted against Secretary Riley. And Count Two, alleging breach of contract cannot survive Secretary Riley, GHEAC, HEAF, and Sallie Mae's Motions to Dismiss.

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[7] Because the Court will dismiss Plaintiffs' breach of contract claim against GHEAC, HEAF, Sallie Mae, and Secretary Riley, it need not consider GHEAC's argument that consideration was received. Neither does the Court need to consider GHEAC's argument that the conditions for rescission are not present.

V. Can Count Three of Plaintiffs' Amended Complaint, Alleging Violations of the Uniform Deceptive Trade Practices Act, Survive Defendants' Motions to Dismiss?

Plaintiffs claim that Defendants violated the Uniform Deceptive Trade Practices Act. O.C.G.A. § 10-1-371 *et seq.*, This Act, however, does not address the situation at bar. Rather, it is designed to remedy unfair trade practices among competitors by regulating the naming, advertising and promotion of goods and services. *See* O.C.G.A. § 10-1-371 *et seq.*; *Boynton State Farm Mutual Automobile Insurance Company,* 207 Ga. App. 756, 757, 429 S.E.2d 304 (1993).[8]

IV. Can Count Four, Alleging an Ex Delicto Contract Breach, Survive Defendants' Motions To Dismiss?

In Count Four of their amended complaint, Plaintiffs assert that Defendants committed an Ex Delicto Contract Breach. In such an action, however, it is necessary that there be a contract between a defendant and a plaintiff. *See Orkin Exterminating Co. v. Stevens,* 130 Ga. App. 363, 365, 203 S.E.2d 587 (1973). Here, there is no contract between Plaintiffs and Defendants, GHEAC, HEAF, and Sallie Mae, and, accordingly, Count Four cannot survive GHEAC's, HEAF's, and Sallie Mae's Motions to Dismiss.[9]

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[8] In order to show that Defendants, GHEAC, HEAF, Sallie Mae, and Secretary Riley, violated the Uniform Deception Trade Practices Act, Plaintiffs claim that the Defendants aided and abetted Riley Institute, that these same Defendants failed to ensure placement of the FTC Holder Rule notice in the consumer contracts, that they failed to comply with the HEA, that they failed to comply with the Georgia Proprietary School Act, that they misrepresented the quality of their goods and services, and that Secretary Riley did not comply with the Emergency Unemployment Compensation Act. The Court will not address these theories because it grants GHEAC, HEAF, Sallie Mae, and Secretary Riley's Motions to Dismiss Count Three of Plaintiffs' Amended Complaint, alleging violations of the Uniform Deceptive Trade Practices Act.

[9] Plaintiffs allege that Defendants, GHEAC, HEAF, and Sallie Mae, committed an ex delicto contract breach because they failed to ensure placement of the FTC Holder Rule in the student loan documents. Since Count Four,

VI. Can Count Five, Alleging that Secretary Riley Violated Plaintiffs Due Process Rights, Survive the Secretary Riley's Motion to Dismiss?

In their final Count, Plaintiffs seek declaratory and injunctive relief for Violations of Due Process. Secretary Riley claims that Plaintiffs' claim is barred by the HEA's anti-injunction provision contained in 20 U.S.C. § 1082(a)(2).[10] Courts have interpreted this "anti-injunction" provision to bar injunctive relief unless the Secretary has exceeded the scope of his authority. *See Canterbury Career Sch., Inc. v. Riley,* 833 F. Supp. 1097, 1103 (D.N.J. 1993). Plaintiffs have not alleged that Secretary Riley has exceeded his authority and, thus, Plaintiffs' claim for injunctive relief against the Secretary is barred by 20 U.S.C. § 1082(a)(2). Additionally, Plaintiffs' claims for declaratory relief is also barred by § 1082(a)(2) because it is apparent from Plaintiffs' complaints and briefs that Plaintiffs only seek to enjoin the Secretary from collecting on their student loans. *See Expedient Services, Inc. v. Weaver,* 614 F.2d 56, 58 (5th Cir. 1980)[11].[12] Accordingly, Count Five cannot survive Secretary Riley's Motion to Dismiss.

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asserting an ex delicto contract, is dismissed against GHEAC, HEAF, and Sallie Mae, the Court will not consider Plaintiffs' theory.

[10] Section 1082(a)(2) states in pertinent part:

> No attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary [of Education] or property under the Secretary's control.

20 U.S.C. § 1082.

[11] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *See Bonner City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

[12] Since the Court will dismiss Count Five of Plaintiffs' Amended Complaint, it need not consider Secretary Riley's arguments concerning Ripeness, Standing, and the Merits of Plaintiffs' Due Process Claim.

VII. Do Plaintiffs Have a Cause of Action Under the Higher Education Act?

Throughout Plaintiffs' amended complaint are references to the Higher Education Act. After analyzing the factors articulated in *Cort v. Ash,* 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975), it is clear that there is no private cause of action under the HEA. The four factors articulated in Cort are

> 1) whether the plaintiffs constitute "one of the class for whose especial benefit the statute was enacted;" 2) whether there is "any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one;" 3) whether inferring a private right of action would be "consistent with the underlying purposes of the legislative scheme;" and 4) whether the cause of action "is traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law."

Cort, 422 U.S. at 78. In determining whether a private cause of action exists, the primary inquiry is Congressional intent. *Northwest Airlines Inc. v. Transport Workers Union of America, AFL-CIO,* 451 U.S. 77, 94, 101 S. Ct. 1571, 1582, 67 L. Ed. 2d 750 (1981).

Clearly the HEA was enacted to benefit plaintiffs as former students attending a post-secondary institution. However, that is not the end of the inquiry, for consideration under the other three factors reveals that a private right of action should not be implied. The second *Cort* factor is an inquiry into congressional intent. When a statute provides detailed administrative remedies, there is a presumption that Congress did not intend to create a private cause of action but, rather, that it provided precisely the remedies it considered appropriate. *See Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263,* 489 U.S. 527, 532-33, 109 S. Ct. 1282, 1286, 103 L. Ed. 2d 539 (1989)(citations omitted). In this case, Congress has provided a detailed regulatory scheme. *See* 34 C.F.R. §§ 668.84 et seq.; 20 U.S.C. §§ 1070(b), 1071, 1082, 1094

(delegating to the Secretary broad enforcement responsibilities). Thus, it can be inferred that Congress did not intend to create a private remedy.[13] Further, any implication of a private cause of action would frustrate the legislative scheme because, it would interfere with the broad enforcement powers of the Secretary. *See L'GGRKE v. Benkula,* 966 F.2d 1346, 1348 (10th Cir. 1992). Similarly, by applying the fourth factor, it is apparent that no private right of action exists. A reading of Plaintiffs' complaint reveals causes of action for fraud, breach of contract and violations of Georgia statutes, all areas which are "traditionally relegated to state law." *See Cort,* 422 U.S. at 78.

Although the Court reaches this decision through its own analysis, it is important to note that an overwhelming majority of Courts who have considered this issue have also found that there is no private cause of action under the HEA. *See L'GGRKE Benkula,* 966 F.2d 1346, 1348 (10th Cir. 1992); *Moy v. Adelphi Institute, Inc.,* 866 F. Supp. 696, 705 (E.D.N.Y. 1994); *Williams v. Nat'l Sch. of Health Technology,* 836 F. Supp. 273, 278 (E.D.Pa. 1993); *Hudson v. Academy of Court Reporting, Inc.,* 746 F. Supp. 718, 721 (S.D. Ohio 1990); *Graham v. Security Sav. and Loan,* 125 F.R.D. 687, 693 (N.D.Ind. 1989), *aff'd sub nom Veal v. First American Sav. Bank,* 914 F.2d 909 (7th Cir. 1990); *St. Mary of the Plains v. Higher Ed. Loan Program,* 724 F. Supp. 803, 808 (D.Kan. 1989). Thus, for all of the above reasons, the Court hold that Plaintiffs do not have a cause of action under the Higher Education Act.

CONCLUSION

For the above reasons, the Motions of Defendants, GHEAC, HEAF, Sallie Mae, and Secretary Riley, to Dismiss Plaintiffs'

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[13] It might be argued that Congress intended to create a private cause of action in 20 U.S.C. 1082(a)(2), which allows the Secretary of Education, with some exceptions, to "sue and be sued." Such provisions are to be construed only as a jurisdictional grant and cannot be used to imply a private cause of action. *See United States v. Testan,* 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976).

Amended Complaint are GRANTED.[14] Accordingly, the Clerk is directed to enter a judgment dismissing Plaintiffs' claims against all Defendants, excepting Riley Institute.

SO ORDERED, this 15th day of December, 1995.
Anthony A. Alaimo

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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[14] Because the Court grants these Defendants' motions, it need not consider Secretary Riley's argument that Plaintiffs' Amended Complaint is, in essence, educational malpractice.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

EDDIE BARTELS, et al.,

Plaintiffs,

v.

ALABAMA COMMERCIAL COLLEGE, Inc.
d/b/a Riley Training Institutes of Savannah,
Waycross and Brunswick, Georgia, Defendant;
RICHARD RILEY, Secretary, U. S. Department of Education, in his official capacity,

Defendant;

HIGHER EDUCATION ASSISTANCE FOUNDATION,

Defendant;

GEORGIA HIGHER EDUCATION CORPORATION, Defendant; and STUDENT LOAN MARKETING ASSOCIATION,

Defendants.

CIVIL ACTION
NO. CV294-150

JUDGMENT

This action came before the Court on motions to dismiss. The issues have been considered and a decision rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Court's Order dated December 15, 1995, granting defendant STUDENT LOAN MARKETING ASSOCIATION, THE HIGHER EDUCATION ASSISTANCE FOUNDATION,

THE GEORGIA HIGHER EDUCATION ASSISTANCE CORPORATION and THE SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, RICHARD RILEY motions to dismiss judgment is hereby entered dismissing Plaintiffs' claim against all Defendants, excepting Riley Institute.

Dated this 15th day of December, 1995.

HENRY R. CRUMLEY, JR., CLERK
BY: _____
Deputy Clerk

Department of Education
Guaranteed Student Loan Program Regulations

§ 682.200 Definitions

(b) The following definitions also apply to this part:

* * *

Origination: A special relationship between a school and a lender, in which the lender delegates to the school, or to an entity or individual affiliated with the school, substantial functions or responsibilities normally performed by lenders before making FFEL loans. In this situation, the school is considered to have "originated" a loan made by the lender.

§ 682.206 Due diligence in making a loan.

(a) *General.* (1) Loan-making duties include processing the loan application and other required forms, approving the borrower for a loan, determining the loan amount, explaining to the borrower his or her rights and responsibilities under the loan, and completing and having the borrower sign the promissory note.

(2) A lender that delegates substantial loan-making duties to a school on a loan thereby enters into a loan origination relationship with the school in regard to that loan. If that relationship exists, the lender may rely in good faith upon statements of the borrower made in the loan application process, but may not rely upon statements made by the school in that process. A non-school lender that does not have an origination relationship with a school with respect to a loan may rely in good faith upon statements of both the borrower and the school in the loan application process. Except as provided in 34 CFR part 668, subpart E, a school lender may rely in good faith upon statements made by the borrower in the loan application process.

(b) *Processing forms*. Before disbursing a loan, a lender must determine that all required forms have been accurately completed by the borrower, the student, the school, and the lender. A lender may not ask the borrower to sign any loan form before all the information requested from the borrower on that form.

Supreme Court, U.S.
FILED

No. 99-540

IN THE

Supreme Court of the United States

EDDIE BARTELS, *et al.*,

Petitioners,

v.

ALABAMA COMMERCIAL COLLEGE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT GEORGIA HIGHER EDUCATION ASSISTANCE CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Do federal laws concerning the federal Guaranteed Student Loan Program, 20 U.S.C. §§ 1071 *et seq.* and regulations adopted thereunder, preempt state agency law so as to allow borrowers to raise fraudulent misrepresentations by a school as a defense to repayment of a loan in circumstances where the school performs acts which are alleged to make the school the agent of the lenders?

PARTIES TO THE PROCEEDING

Petitioners are Eddie Bartels, Alfreda C. Bantum, Ruby C. Carr, Michele Cross, Sharon Days, Iris Hull, Mary L. Manley, Iris Miller, Linda Mosley, Alethia Pickney, Octavis Roberson, Leonie Smart, Shirley Travis, and Doretha Young, all of whom are former students of Riley Training Institute of Georgia. Petitioners were plaintiffs and appellants in the proceedings below. Defendants-appellees in the proceedings below are Secretary of Education Richard Riley, in his official capacity, the Georgia Higher Education Assistance Foundation, the Higher Education Assistance Foundation, and the Student Loan Marketing Association. Defendants-appellees are assignees of one or more student loans for petitioners.

Alabama Commercial College, the operator of the Riley Training Institute, was a defendant in the district court below but was not a party to the appeal. A default judgment was entered against Alabama Commercial College in the district court.

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STATUTORY PROVISIONS INVOLVED

The GHEAC Appendix sets forth the statutes and regulations cited by this Respondent as the basis for its contention that federal law preempts the common law of agency so as to impose liability on loan holders for the school's acts as alleged agent of the lenders. They are: 11th Cir. R. 36-2; 20 U.S.C. §§ 1078(a), (b), 1092(a), (b), 1094(a) (1990); 34 C.F.R. §§ 668.41(a), 668.43(a)-(c), 682.207(b), 682.603(a)-(e), and 682.604(c), (g) (1986).

STATEMENT OF THE CASE

This is a purported Class Action in the U.S. District Court for the Southern District of Georgia filed by thirteen Georgia residents (the "Petitioners") seeking to avoid their obligation under loans they received as participants in the Guaranteed Student Loan Program ("GSLP or GLS program"). The Petitioners claimed to have been enrolled at Alabama Commercial College, Inc. d/b/a Riley Training Institute of Savannah, Waycross and Brunswick (the "School") between 1988 and 1991. Named as defendants were the school (alleged to have failed to provide a quality education and to have failed to fulfill a promise of post-education employment); the Secretary of The U.S. Department of Education (allegedly responsible for implementing and overseeing the GSL program) and, the Student Loan Marketing Association (allegedly the holder of a number of guaranteed loans). Also named were two organizations – Higher Education Assistance Corporation and this Respondent, the Georgia Higher Education Assistance Corporation ("GHEAC") – which allegedly guaranteed a substantial number of student loans obtained by the Petitioners, and which were alleged to be the assignees of a substantial number of such loans. The banks which

actually made the loans to the Petitioners were not named as defendants (the defendants other than the school are hereinafter sometimes referred to as the "Nonschool Defendants").

The Petitioners attempted in the courts below to impose vicarious liability on the Nonschool Defendants for fraud and breach of contract under state law on the basis of the relationship which is alleged to have existed among Petitioners, the School, and the non-party lender banks. The district court dismissed the Petitioners' claims in an order reported at *Bartels v. Alabama Commercial College, Inc.*, 918 F. Supp. 1565 (S.D. Ga. 1995).

The Court of Appeals affirmed the dismissal in an unpublished order entered June 29, 1999. In pertinent part, the Court of Appeals affirmed dismissal of the claims against the Nonschool Defendants on the grounds that:

1. The district court did not err in determining that federal law preempted the Petitioners' claim under the Georgia law of agency.

2. The district court did no err in determining that the Petitioners had no rights under the FTC Holder Rule.

The Petitioners have filed their petition only with respect to the first ground for affirmance.

Petitioners' statement of the case completely fails to describe the pervasive and comprehensive federal scheme that governs the GSLP. The relationship between borrowers and lenders under the GSL program is highly regulated under the Higher Education Act (the "HEA"), 20 U.S.C. §§ 1001 *et seq.* and its implementing regulations. This regulatory scheme contemplates the fact that a student often has no

face-to-face contact with the lender whatsoever (*See* 54 Fed. Reg. 24114, 24125 (June 5, 1989) (comments of the Secretary of Education stating that lenders have no responsibility for in-person counseling of borrowers since they often have no face-to-face contact with borrowers).

Under the statute and implementing regulations, for example, a participating school is required to perform a number of tasks before a student may receive federally insured loans. The school must inform a student about financial aid. 20 U.S.C. §§ 1092(a), 1094(a)(9) (1990); 34 C.F.R. § 668.41 (1986). The school must explain to the student the requisite procedures and forms for applying for financial assistance. 20 U.S.C. § 1092(a)(1)(A)-(C) (1990); 34 C.F.R. § 668.43(b) (1986). The school must inform the student of his or her eligibility for financial aid. 20 U.S.C. §§ 1092(a), 1094(a)(9)(1990); 34 C.F.R. §§ 668.41(a), 668.43(b) (1986).

The school must perform certain administrative tasks necessary to process loan applications as well. These include completion of key parts of the borrower's loan application, such as those containing the amount of the loan recommended and the evaluation of the borrower's financial need. 20 U.S.C. § 1078(a)(2) (1990). The school must certify that the amount of the loan requested does not exceed the cost to the student of attending the school, in light of other resources available to the student, including a contribution from family resources and other financial aid. 20 U.S.C. § 1078(a)(2)(A)-(F) (1990); 34 C.F.R. § 682.603(a)-(e) (1986).

The school's involvement continues after the lender decides to make a GSL program loan. If the borrower is a student, his or her lender must disburse the loan proceeds

directly to the school. 20 U.S.C. § 1078(b)(1)(N) (1990); 34 C.F.R. § 682.207(b)(1)(v) (1986). The school is then required to process the proceeds. 34 C.F.R. § 682.604(c) (1986). The borrower must notify the institution, not the lender, of a change in address or a change in status that may affect the student's eligibility for the loan. 20 U.S.C. § 1078(b)(1)(P)(1990). Finally, the school is required to conduct exit counseling, to provide borrowers with information about their indebtedness, to review the repayment options and to suggest the debt management strategies. 20 U.S.C. § 1092(b) (1990); 34 C.F.R. § 682.604(g) (1986). In sum, the GSLP creates a long-distance lending program that is not like a conventional loan program.

REASONS FOR DENYING THE WRIT
SUMMARY OF ARGUMENT

The Petitioners have asked this Court to review an unpublished decision of the Eleventh Circuit in order to correct a purported conflict between that circuit and the Seventh Circuit. Under the rules of the Eleventh Circuit, its unpublished opinion has no precedential value. In addition, the purportedly conflicting decision of the Seventh Circuit was not a *decision* of that circuit at all, but merely *dicta* in a footnote that would conflict with the holding of that case only if it is interpreted as Petitioners erroneously interpret it.

The Petition should be denied for the additional reason that the decision of the court below was fully consistent with this Court's preemption jurisprudence and hence provides no ground for review by this Court.

Finally, contrary to the assertions in the Petition, the holding of the court below has no impact on the rights of borrowers under the current GSL program because of changes that occurred in that program in 1993.

Petitioners are asking this Court to review an order that has no bearing on current federal policy, has no precedential value, and does not conflict with the decision of any federal court of appeals. The Petition should therefore be denied.

I. Petitioners Have Failed To Establish That The Decision Of The Eleventh Circuit Conflicts With The Decision Of A United States Court Of Appeals Or A State Court Of Last Resort.

The Court should deny the Petition for Certiorari because no conflict exists among the circuits. Petitioners argue that the decision of the Court of Appeals in this case is in conflict with the Seventh Circuit's decision in *Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990). This suggestion is merely an attempt to manufacture a conflict where none exists. First, the decision of the Eleventh Circuit in this case does not even constitute binding precedent because the opinion was unpublished. 11th Cir. R. 36-2 states that unpublished opinions do not constitute binding precedent. Second, the decision in *Veal* that ostensibly creates the conflict was not a holding of the court: it was *dicta* in a footnote at the end of the opinion.

The *Veal* case began as a class action by students who had enrolled at a college that subsequently went bankrupt. The students in *Veal* sued the institutions through which they obtained their student loans although, as in the present case, the plaintiffs had failed to allege any fraudulent activity on the part of the Nonschool Defendants. The plaintiffs in *Veal* contended that the Nonschool Defendants were subject to school-related defenses because they were "closely connected by a mutually beneficial, continuous

business arrangement."[1] *Graham v. Security Savings and Loan*, 125 F.R.D. 687, 689 (N.D. Ind. 1989), *aff'd sub nom. Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990). The district court granted a motion to dismiss these claims.

On appeal, the Seventh Circuit Court of Appeals noted that the district court had been unimpressed by the students' "close connection" argument and had granted the defendants' motion to dismiss for failure to state a claim, and further noted that the district court had also found that the remedies under the HEA were limited to those enumerated in the statute *and* that the HEA preempted the students' state law remedies. *Veal*, 914 F.2d at 912. The Court of Appeals then summarized its holding as follows: "We agree that the students have failed to state a claim for relief against the defendants, and therefore affirm on this ground alone." 914 F.2d at 911. The court found the arguments that the students had advanced to bind the actions of the School to the

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[1] In support of their claim of a "close connection" between the lenders and the School, the *Veal* plaintiffs alleged as follows:

> Adelphi [the school] selected First American Savings as the Lender, used First American Savings' loan forms, and prearranged the loans for the students. Adelphi maintained and utilized preapproved promissory notes, usually preprinted with the name of First American Savings, and represented to the plaintiffs that all financial arrangements necessary to the loan approval had been prearranged with First American Savings. In short, Aldelphi dealt directly with the students and assumed responsibility to get all necessary forms to the lenders. First American Savings repeatedly and regularly made loans to finance the 'educational services' the Plaintiffs anticipated receiving from Adelphi.

Veal, 914 F.2d at 913, n.4.

nonschool defendants to be "unpersuasive" and accordingly ruled that "[b]ecause the students have failed to allege a connection between the fraudulent activity of Adelphi and the defendants, the district court correctly granted defendants' motion to dismiss for failure to state a claim." 914 F.2d at 914.

The sole basis for the Petitioner's assertion that the holding of *Veal* conflicts with the holding of the Eleventh Circuit here was *dicta* in a footnote at the end of the opinion. The Seventh Circuit observed that, although the students were without recourse in federal court, they were not without any remedy because--among other reasons--if sued by a lender in state court for collection of one of the loans, "each of them would be entitled to assert any defenses available under state law that are applicable to his or her particular loan." 914 F.2d at 914, n.7. The Seventh Circuit did not expressly indicate that the "close connection" or "agency" defense would be among the state law defenses which would be available to the borrowers in seeking to defeat a collection action.[2] Indeed, any inference to that effect would be inconsistent with the holding of the case, which rejected the "agency" or "close connection" theory. Most important, this *dictum* was not a *decision* of the court in conflict with the decision of the Eleventh Circuit at issue here, and hence does not provide a basis for granting Petitioners' petition.

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[2] Other available state law defenses might include payment, accord and satisfaction, release and the applicable statute of limitations.

II. The Rulings Below Do Not Conflict With Existing Supreme Court Precedents.

A. The Court of Appeals Correctly Held That the Higher Education Act Preempts the Petitioner's State Law Claims.

This Court also should deny the Petition for Certiorari because the Court of Appeals correctly held that the state law of agency is preempted by the Higher Education Act and the applicable regulations. This Court has held that federal law preempts state law if "the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987) (citations omitted). Federal regulations have no less preemptive effect than federal statutes. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982). Where a state law provision "would do a serious blow to the Congressional scheme," the absence of express conflicting language in federal legislation does not preclude preemption. *U.S. v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 597 (1982).

The only specific acts alleged in the Complaint as subjecting the Nonschool Defendants to school-related defenses are that (1) the school performed a number of actions which ostensibly are normally performed only by lenders before making loans,[3] and (2) the loan documents

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[3] Specifically, it is alleged, upon information and belief, that the school determined who received the loans and the amount of the loans; verified the identity of the borrower, assisted the borrower in completing the loan application forms, and prepared, presented and collected the documentation. (Record 61, Amended Complaint ¶ 103).

signed by the Petitioners were prepared and presented to them by representatives of the school, without the Petitioners having any direct contact with the lenders. (Record 61, Amended Complaint ¶ 104). Even when taken as true, however, these allegations are insufficient to make the Nonschool Defendants responsible for the School's misdeeds because the allegations in support of this claim describe activities which would be followed respectively by any school or lender in complying with the procedures required under the GSL program.

The GSLP is not a conventional loan program, where the borrower deals directly and primarily with his bank in the initiation of a loan. Rather, the GSLP is an entirely unconventional program, whose basic elements include the lender's extension of credit to a borrower he may never meet and a school that actively assists in facilitating the loan transaction. These are the elements which Petitioners assert as giving rise to "agency" liability under state law. However, these elements amount to nothing more than long-distance lending, which is integral to the operation of the GSLP. Such long-distance lending is necessary to fulfill the paramount objective of the GSL program: to encourage lenders to make funds available to students around the country to attend schools of their choice. *See Morgan v. Markerdown Corporation*, 976 F. Supp. 301, 308-09 (D.N.J. 1997). To impose liability under state agency law on the Nonschool Defendants for participating under the terms of this program would clearly stand as an obstacle to the accomplishment and execution of the full purposes of Congress. The court below properly found that the Petitioners' agency claims are preempted.

B. The Holding of the Eleventh Circuit is Not in Conflict with the Prior Decisions of this Court.

The Petition in the present case asserts that the decision of the Eleventh Circuit was based on a finding that the relationship between the lenders and the School was merely "permitted" under the GSLP. In making this assertion, Petitioners suggest that conflict preemption occurs only where the state-law prohibition contravenes an express federal mandate. This suggestion in the Petition is inconsistent with the holdings of this Court.

State law, to be preempted, need not run afoul of an express federal mandate. A conflict does not evaporate because a regulation merely permits, but does not compel, the activity in question. Federal and state law may be in "irreconcilable conflict" even when they do not impose directly conflicting duties, where the state statute prohibits conduct authorized by the federal statute. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) ("irreconcilable conflict" between federal statute that authorized banks to sell insurance and state statute that prohibited it); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By limiting the availability of an option the federal government considers available under one of its programs, a state creates "an obstacle to the accomplishment and execution of the full purposes and objectives" of the program at issue. *Fidelity Federal Savings and Loan*, 458 U.S. at 155, 156. To the extent that the court below held that state law is preempted because it prohibited conduct that was permitted under the HEA, it is completely consistent with the holdings of this Court.

Furthermore, the holding of the court below was not based only on the fact that the close relationship between the schools and the lenders was merely *permitted*. The Court found that the extensive regulations governing the student loan program expressly authorized the actions that created the alleged agency liability and that state agency law thus stood as an obstacle to the federal program:

> A majority of courts addressing the issue have determined that federal law preempts state law defenses to student loan enforcement which impose liability based on a relationship between schools and lenders mandated or contemplated by the HEA. The borrowers' claims under the Georgia law of agency seek to do just that – impose liability on the non-school defendants based on a relationship between the school and the lenders expressly contemplated, if not mandated, by the HEA. The lenders [sic] assert that the school acted as an agent of the lenders by exercising lender functions in procuring loans for the borrowers. Yet the GSLP expressly permits lenders to delegate lender functions to schools with which they enter into "origination relationships." *See* 34 C.F.R. §§ 682.200; 682.206(a)(b) (1998). *Allowing the borrowers' claims would penalize lenders for participating in the GSLP program according to its express terms*. This would tend to discourage participation of lenders and guaranty agencies in the program. *Cf. Jackson*, 788 F. Supp. at 1247 ("[A] state law claim cannot lie to the extent it would penalize participants in the GSL[P]...for following Congressional directives.") Therefore, the Georgia law of agency and any other applicable state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of

> Congress," *California Federal Savings and Loan Ass'n. v. Guerra*, 479 U.S. 272, 281 (1987), to the extent that they impose liability on the non-school defendants based on the school's exercise of lending functions.

Petitioners' App. 7a – 8a (footnotes omitted; emphasis supplied).

The holding of the Court of Appeals was thus based on two separate conflict-preemption findings: (1) the Court found that the state-law "agency" theory of vicarious liability stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; and (2) the Court found that the state-law "agency" theory of vicarious liability would penalize lenders for participating in the GSL program according to its express terms. Each of these findings was supported by the previous rulings of this Court and by the record before the Court of Appeals.

III. The Petition Misleadingly Asserts That The Disposition Of This Case Will Impact Current GSLP Borrowers And Mischaracterizes The Disposition Of The "Origination" Theory Of Vicarious Liability In The Court Below.

Plaintiffs misleadingly assert that the holding of the Court of Appeals in this case is more sweeping than the holding in *Armstrong v. Accrediting Council for Continuing Education and Training, Inc.*, 168 F.3d 1362 (D.C. Cir. 1999), and that, under the holding in this case, state agency law will continue to be preempted by GSLP regulations. Petition for Certiorari pp. 9-10. This assertion completely ignores the 1993 changes to the GSL program, documented in *Armstrong*, when the Secretary of Education adopted a

"Common Promissory Note" that subjects lenders to claims and defenses that can be raised against the school. 168 F.3d at 1365-1366. Accordingly, unlike the loan contracts at issue here, the Common Promissory Note now used by all lenders expressly authorizes actions like this one.

Petitioners also mischaracterize the holding of the court below on Petitioners' claim based upon the Secretary of Education's policy of forbearing enforcement of school-originated loans. The Court of Appeals correctly noted that the Petitioners had failed to present the dismissal of the their "origination" theory of vicarious liability "as a distinct point of error." Petitioners' Appendix, p. 9a, n.6. Moreover, the Court of Appeals also upheld the District Court's disposition of the "origination" claim, which disposition was based on the fact that the Secretary had never promulgated its "origination-forbearance" policy as a binding administrative rule. Petitioners' App. p. 9a, n.6. *See also Bartels*, 918 F. Supp. at 1569-70. Accordingly, the Court of Appeals' treatment of the "origination" theory of vicarious liability was based on the merits of that theory, rather than upon any preemption argument.

IV. The Decision Below Should Be Affirmed On Numerous Grounds, Some Of Which Were Raised By The Parties But Not Addressed By The Decisions Below, And Some of Which Were Addressed By The Decisions Below And Not Made Part Of The Appeal Or Of This Petition for Certiorari.

The District Court granted the motions to dismiss on some but not all of the grounds that were asserted by the Nonschool Defendants. In turn, the decision of the Court of

Appeals was also based on fewer then all of the grounds asserted in the motions to dismiss.

In reviewing the decisions below, this Court is not limited to the grounds embraced by the lower courts. *See U.S. v. Arthur Young and Co.*, 465 U.S. 805, 814, n.12 (1984) (a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below); *U.S. v. New York Telephone Co.*, 434 U.S. 159, 166, n.8 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6 (1970). Rather, the decisions below may be upheld on grounds not alleged by any respondent or considered by the courts below. *Mitsubishi International Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1517 (11th Cir. 1994); *Powers v. United States*, 996 F.2d 1121, 1123-24 (11th Cir. 1993).

GHEAC submits that the courts below reached the correct results for numerous reasons. Some of these reasons were raised by GHEAC below but not addressed by the decisions below, and other reasons were addressed by the decisions below but not appealed to the Court of Appeals or included as grounds for the instant petition. The Petitioners have waived their rights to challenge those determinations which they have failed to appeal or to assert in the present Petition.

The decisions below should be upheld for all of the reasons asserted by GHEAC below including those reasons not addressed by the courts below.[4]

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[4] These "alternative grounds" include the following: that the District Court properly granted the GHEAC Motion to Dismiss the Second Amended Complaint due to the Petitioners' failure to submit a timely response; that the Petitioners have alleged no fraudulent conduct by the Nonschool Defendants; that promises as to future events are not actionable; that most of the fraud claims are barred by the applicable statute of limitations; that the enrollment agreements and the loan agreements were supported by consideration inasmuch as the lenders parted with their funds and inasmuch as the plaintiffs attended classes; that the Petitioners had failed to establish the conditions for rescission; that the allegations of the agency relationship did not support holding the Nonschool Defendants responsible for the conduct of the School under state law; that the Petitioners failed to appeal the dismissal of Count 3 of the Complaint; that the Petitioners failed to satisfy the conditions for making the Holder Rule claim under state law; that the implication of a duty under state law cannot operate to create obligations which do not arise under the Holder Rule itself; that the Holder Rule does not apply to pre-1992 student loan agreements; that the Holder Rule by its terms does not impose a duty upon the Guarantor; and that the Holder Rule is not violated, and it creates no basis for liability, under any theory, where prescribed notice is absent from the contract.

CONCLUSION

For all of the foregoing reasons, the present Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

§ 1078. Federal payments to reduce student interest costs

(a) Federal interest subsidies

* * *

(2) Additional requirements to receive subsidy

(A) Each student qualifying for a portion of an interest payment under paragraph (1) shall --

(i) have provided to the lender a statement from the eligible institution, at which the student has been accepted for enrollment, or at which the student is in attendance, which –

(I) sets forth the loan amount for which the student shows financial need; and

(II) sets forth a schedule for disbursement of the proceeds of the loan in installments, consistent with the requirements of section 1078-7 of this title; and

(III) Repealed. Pub.L. 105-244, Title IV, § 417(a)(1)(A), Oct. 7, 1998, 112 Stat. 1682

(ii) meet the requirements of subparagraph (B); and

(iii) have provided to the lender at the time of application for a loan made, insured, or guaranteed under this part, the student's driver's number, if any.

(B) For the purpose of clause (ii) of subparagraph (A), a student shall qualify for a portion of an interest payment under paragraph (1) if the eligible institution has determined

and documented the student's amount of need for a loan based on the student's estimated cost of attendance, estimated financial assistance, and, for the purpose of an interest payment pursuant to this section, expected family contribution (as determined under part E of this subchapter [20 U.S.C.A. § 1087kk et seq.]), subject to the provisions of subparagraph (D).

(C) For the purpose of subparagraph (B) and this paragraph –

(i) a student's cost of attendance shall be determined under section 1087ll of this title;

(ii) a student's estimated financial assistance means, for the period for which the loan is sought—

(I) the amount of assistance such student will receive under subpart 1 of part A of this subchapter [20 U.S.C.A. § 1070a et seq.] (as determined in accordance with section 1091(b) of this title), subpart 3 of part A of this subchapter [20 U.S.C.A. § 1070b et seq.], and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.] and part D of this subchapter [20 U.S.C.A. § 1087aa et seq.];

(II) any veterans' education benefits paid because of enrollment in a post secondary education institution, including veterans' education benefits (as defined in section 1087vv(c) of this title, but excluding benefits described in paragraph (2)(E) of such section); plus

(III) other scholarship, grant, or loan assistance, but excluding any national service education award or post-

service benefit under title I of the National and Community Service Act of 1990 [42 U.S.C.A. § 12511 et seq.]; and

(iii) the determination of need and of the amount of a loan by an eligible institution under subparagraph (B) with respect to a student shall be calculated in accordance with part E of this subchapter [20 U.S.C.A. § 1087kk et seq.].

(D) An eligible institution may not, in carrying out the provisions of subparagraphs (A) and (B) of this paragraph , provide a statement which certifies the eligibility of any student to receive any loan under this part in excess of the maximum amount applicable to such loan.

(E) For the purpose of subparagraphs (B) and (C) of this paragraph, any loan obtained by a student under section 1078-1 or 1078-8 of this title or a parent under section 1078-2 of this title or under any State-sponsored or private loan program for an academic year for which the determination is made may be used to offset the expected family contribution of the student for that year.

* * *

(b) Insurance program agreements to qualify loans for interest subsidies

(1) Requirements of insurance program

Any State or any nonprofit private institution or organization may enter into an agreement with the Secretary for the purpose of entitling students who receive loans which are insured under a student loan insurance program of that State, institution, or organization to have made on their behalf the

payments provided for in subsection (a) of this section if the Secretary determines that the student loan insurance program –

* * *

(N) provides that funds borrowed by a student—

(i) are disbursed to the institution by check or other means that is payable to, and requires the endorsement or other certification by, such student; or

(ii) in the case of a student who is studying outside the United States in a program of study abroad that is approved for credit by the home institution at which such student is enrolled or at an eligible foreign institution, are, at the request of the student, disbursed directly to the student by the means described in clause (i), unless such student requests that the check be endorsed, or the funds transfer authorized, pursuant to an authorized power-of-attorney;

* * *

(P) requires the borrower to notify the institution concerning any change in local address during enrollment and requires the borrower and the institution at which the borrower is in attendance promptly to notify the holder of the loan, directly or through the guaranty agency, concerning (i) any change of permanent address, (ii) when the student ceases to be enrolled on at least a half-time basis, and (iii) any other change in status, when such change in status affects the student's eligibility for the loan;

§ 1092. Institutional and financial assistance information for students

(a) Information dissemination activities

(1) Each eligible institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 shall carry out information dissemination activities for prospective and enrolled students (including those attending or planning to attend less than full time) regarding the institution and all financial assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42. The information required by this section shall be produced and be made readily available upon request, through appropriate publications, mailings, and electronic media, to an enrolled student and to any prospective student. Each eligible institution shall, on an annual basis, provide to all enrolled students a list of the information that is required to be provided by institutions to students by this section and section 444 of the General Education Provisions Act (also referred to as the Family Educational Rights and Privacy Act of 1974), together with a statement of the procedures required to obtain such information. The information required by this section shall accurately describe –

(A) the student financial assistance programs available to students who enroll at such institution;

(B) the methods by which such assistance is distributed among student recipients who enroll at such institution;

(C) any means, including forms, by which application for student financial assistance is made and requirements for accurately preparing such application;

(D) the rights and responsibilities of students receiving financial assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42;

(E) the cost of attending the institution, including (i) tuition and fees, (ii) books and supplies, (iii) estimates of typical student room and board costs or typical commuting costs, and (iv) any additional cost of the program in which the student is enrolled or expresses a specific interest;

(F) a statement of -

(i) the requirements of any refund policy with which the institution is required to comply;

(ii) the requirements under section 1091b of this title for the return of grant or loan assistance provided under this subchapter [20 U.S.C.A. § 1070 et seq.] and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.]; and

(iii) the requirements for officially withdrawing from the institution;

(G) the academic program of the institution, including (i) the current degree programs and other educational and training programs, (ii) the instructional, laboratory, and other physical plant facilities which relate to the academic program, and (iii) the faculty and other instructional personnel;

(H) each person designated under subsection (c) of this section, and the methods by which and locations in which any person so designated may be contacted by students and

prospective students who are seeking information required by this subsection;

(I) special facilities and services available to handicapped students;

(J) the names of associations, agencies or governmental bodies which accredit, approve, or license the institution and its programs, and the procedures under which any current or prospective student may obtain or review upon request a copy of the documents describing the institution's accreditation, approval, or licensing;

(K) the standards which the student must maintain in order to be considered to be making satisfactory progress, pursuant to section 1091(a)(2) of this title;

(L) the completion or graduation rate of certificate- or degree-seeking, full-time, undergraduate students entering such institutions;

(M) the terms and conditions under which students receiving guaranteed student loans under part B of this subchapter or direct student loans under part D of this subchapter, or both, may –

(i) obtain deferral of the repayment of the principal and interest for service under the Peace Corps Act (as established by the Peace Corps Act (22 U.S.C. 2501 et seq.)) or under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 et seq.), or for comparable full-time service as a volunteer for a tax-exempt organization of demonstrated effectiveness in the field of community service, and

(ii) obtain partial cancellation of the student loan for service under the Peace Corps Act (as established by the Peace Corps Act (22 U.S.C. § 2501 et seq.)) under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 et seq.), or , for comparable full-time service as a volunteer for a tax-exempt organization of demonstrated effectiveness in the field of community service;

(N) that enrollment in a program of study abroad approved for credit by the home institution may be considered enrollment in the home institution for purposes of applying for Federal student financial assistance; and

(O) the campus crime report prepared by the institution pursuant to subsection (f), including all required reporting categories.

(2) For the purpose of this section, the term "prospective student" means any individual who has contacted an eligible institution requesting information concerning admission to that institution.

(3) In calculating the completion or graduation rate under subparagraph (L) of paragraph (1) of this subsection or under subsection (e) of this section, a student shall be counted as a completion or graduation if, within 150 percent of the normal time for completion of or graduation from the program, the student has completed or graduated from the program, or enrolled in any program of an eligible institution for which the prior program provides substantial preparation. The information required to be disclosed under such subparagraph –

(A) shall be made available by July 1 each year to enrolled students and prospective students prior to the students enrolling or entering into any financial obligation; and

(B) shall cover the one-year period ending on August 31 of the preceding year.

(4) For purposes of this section, institutions may exclude from the information disclosed in accordance with subparagraph (L) of paragraph (1) the completion or graduation rates of students who leave school to serve in the armed services, on official church missions, or with a recognized foreign aid service of the Federal Government.

(5) The Secretary shall permit any institution of higher education that is a member of an athletic association or athletic conference that has voluntarily published completion or graduation rate data or has agreed to publish data that, in the opinion of the Secretary, is substantially comparable to the information required under this subsection, to use such data to satisfy the requirements of this subsection.

(6) Each institution may provide supplemental information to enrolled and prospective students showing the completion or graduation rate for students described in paragraph (4) or for students transferring into the institution or information showing the rate at which students transfer out of the institution.

(b) Exit counseling for borrowers

(1)(A) Each eligible institution shall, through financial aid officers or otherwise, make available counseling to

borrowers of loans which are made, insured, or guaranteed under part B (other than loans made pursuant to section 1078-2 of this title) of this subchapter or made under part C or D of this subchapter prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include –

(i) the average anticipated monthly repayments, a review of the repayment options available, and such debt and management strategies as the institution determines are designed to facilitate the repayment of such indebtedness; and

(ii) the terms and conditions under which the student may obtain partial cancellation or defer repayment of the principal and interest pursuant to sections 1078(b), 1087dd(c)(2), and 1087ee of this title.

(B) In the case of the borrower who leaves an institution without the prior knowledge of the institution, the institution shall attempt to provide the information described in subparagraph (A) to the student in writing.

(2)(A) Each eligible institution shall require that the borrower of a loan made under part B, C, or D of this subchapter submit to the institution, during the exit interview required by this subsection—

(i) the borrower's expected permanent address after leaving the institution (regardless of the reason for leaving);

(ii) the name and address of the borrower's expected employer after leaving the institution;

(iii) the address of the borrower's next of kin; and

(iv) any corrections in the institution's records relating the borrower's name, address, social security number, references, and driver's license number.

(B) The institution shall, within 60 days after the interview, forward any corrected or completed information received from the borrower to the guaranty agency indicated on the borrower's student aid records.

(C) Nothing in this subsection shall be construed to prohibit an institution of higher education from utilizing electronic means to provide personalized exit counseling.

§ 1094. Program participation agreements

(a) Required for programs of assistance; contents

In order to be an eligible institution for the purposes of any program authorized under this subchapter [20 U.S.C.A. § 1070 et seq.] and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.], an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall, except with respect to a program under subpart 4 of part A of t his subchapter [20 U.S.C.A. § 1070c et seq.], enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

(9) In the case of an institution participating in a program under part B or C of this subchapter, the institution will

inform all eligible borrowers enrolled in the institution about the availability and eligibility of such borrowers for State grant assistance from the State in which the institution is located, and will inform such borrowers from another State of the source for further information concerning such assistance from that State.

§ 668.41 Reporting and disclosure of information.

(a) Each institution participating in any Title IV, HEA program shall disseminate to all enrolled students, and to prospective students upon request, through appropriate publications and mailing, information concerning –

(1) The institution (see § 668.44); and

(2) Any student financial assistance available to students enrolled in the institution see § 668.43).

(3) The institution's completion or graduation rate and its transfer-out rate, produced in accordance with § 668.46.

§ 668.43 Financial assistance information.

(a)(1) Information on financial. assistance that the institution must publish and make readily available to current and prospective student's under this subpart includes, but is not limited to, a description of all the Federal, State, local, private, and institutional student financial assistance programs available to students who enroll at that institution.

(2) These programs include both need-based and non-need-based programs.

(3) The institution may describe its own financial assistance programs by listing them in general categories.

(b) For each program referred to in paragraph (a) of this section, the information provided by the institution must describe –

(1) The procedures and forms by which students apply for assistance;

(2) The student eligibility requirements;

(3) The criteria for selecting recipients from the group of eligible applicants; and

(4) The criteria for determining the amount of a student's award.

(c) The institution shall describe the rights and responsibilities of students receiving financial assistance and, specifically, assistance under the title IV, HEA programs.

This description must include specific information regarding—

(1) Criteria for continued student eligibility under each program;

(2)(i) Standards which the student must maintain in order to be considered to be making satisfactory progress in his or her course of study for the purpose of receiving financial assistance; and

(ii) Criteria by which the student who has failed to maintain satisfactory progress may re-establish his or her eligibility for financial assistance;

(3) The method by which financial assistance disbursements will be made to the students and the frequency of those disbursements;

(4) The terms of any loan received by a student as part of the student's financial assistance package, a sample loan repayment schedule for sample loans and the necessity for repaying loans;

(5) The general conditions and terms applicable to any employment provided to a student as part of the student's financial assistance package; and

(6) The institution shall provide and collect exit counseling information as required by 34 CFR 674.42 for borrowers under the Federal Perkins Loan Program, by 34 CFR 685.304 for borrowers under the William D. Ford Federal Direct Loan Program, and by 34 CFR 682.604 for borrowers under the Federal Stafford Loan Program.

§ 682.207 Due diligence in disbursing a loan.

(b)(1) In disbursing a loan, a lender—

(v) Shall disburse—

(A) Except as provided in paragraph (b)(1)(v)(C)(1) and (D) of this section, directly to the school;

(B) In the case of a Federal PLUS loan—

(1) By electronic funds transfer or master check from the lender in accordance with the disbursement schedule provided by the school to a account maintained in accordance with § 668.163 by the school as trustee for the lender. A disbursement made by electronic funds transfer or master check must be accompanied by a list of the names, social security numbers, and loan amounts of the borrowers who are receiving a portion of the disbursement and the names and social security numbers of the students on whose behalf the parents are borrowing.

(2) By a check from the lender that is made co-payable to the institution and the parent borrower directly to the institution of higher education.

(3) In the case of a student enrolled in a foreign institution, a check from the lender that is made co-payable to the institution and sent directly to either the parent or the eligible institution.

(C) In the case of a student enrolled in a study-abroad program approved for credit at the home institution in which the student is enrolled, if the student requests –

(1) Directly to the student; or

(2) To the home institution if the borrower provides a power-of-attorney to an individual not affiliated with the institution to endorse the check or complete an electronic funds transfer authorization.

(D) In the case of a student enrolled in an eligible foreign school, if the student requests—

(1) Directly to the student; or

(2) To the institution if the borrower provides a power-of-attorney to an individual not affiliated with the institution to endorse the check or complete an electronic funds transfer authorization.

(vi) Except as provided in paragraph (d)(2) of this section, may not disburse a second or subsequent disbursement on a Stafford or SLS loan to a student who has ceased to be enrolled.

(2) Except as provided in paragraph (b)(1)(v)(C)(2) of this section, neither a lender nor a school may obtain a borrower's power of attorney or other authorization to endorse or otherwise approve the cashing of a loan check or the release of funds disbursed by electronic funds transfer, nor may a borrower provide this power of attorney or authorization to anyone else. However, the school may present the loan check to a financial institution for deposit in an account of the borrower pursuant to the borrower's written authorization under paragraph (b)(1)(ii)(A) of this section.

§ 682.603 Certification by a participating school in connection with a loan application.

(a) A school shall certify that the information it provides in connection with a loan application about the borrower and, in the case of a parent borrower, the student for whom the loan is intended, is complete and accurate. Except as provided in 34 CFR part 668, subpart E, a school may rely in good faith upon statements made on the application by the student.

(b) The information to be provided by the school about the borrower making application for the loan pertains to—

(1) The borrower's eligibility for a loan, as determined in accordance with § 682.201 and § 682.401(b) (1) and (2);

(2) The student's estimated cost of attendance for the period for which the loan is sought;

(3) The student's estimated financial assistance for the period for which the loan is sought;

(4) For a Stafford loan, the student's eligibility for interest benefits, based on information provided by the student upon which the school can rely and as determined in accordance with § 682.301; and

(5) The schedule for disbursement of the loan proceeds, which must reflect the delivery of the loan proceeds as set forth in § 682.604(c)(6).

(c) [Reserved]

(d) A school may not certify a Stafford or PLUS, loan application, or combination of loan applications, for a loan amount that—

(1) The school has reason to know would result in the borrower exceeding the annual or maximum loan amounts in § 682.204; or

(2) Exceeds the student's estimated cost of attendance, less—

(i) The student's estimated financial assistance for that period; and

(ii) In the case of a Stafford loan that is eligible for interest benefits, the borrower's expected family contribution for that period.

(e) A school may refuse to certify a Stafford or PLUS loan application or may reduce the borrower's determination of need for the loan if the reason for that action is documented and provided to the student in writing, provided—

(1) The determination is made on a case-by-case basis;

(2) The documentation supporting the determination is retained in the student's file; and

(3) The school does not engage in any pattern or practice that results in a denial of a borrower's access to FFEL loans because of the borrower's race, sex, color, religion, national origin, age, handicapped status, income, or selection of a particular lender or guaranty agency.

§ 682.604 Processing the borrower's loan proceeds and counseling borrowers.

(c) Processing of the loan proceeds by the school.

(1) Except as provided in paragraph (c)(3) of this section, if a school receives a borrower's loan proceeds, it shall hold the funds until the student has registered for classes for the period of enrollment for which the loan is intended and then follow the procedures in paragraph (c)(2) of this section.

(2)(i) Except as provided in § 682.207(b)(1)(v)(C)(1) and (D)(1), after the student has registered, if the loan proceeds are disbursed by means of a check that requires the endorsement of the student only, the school shall deliver the check to the student, subject to paragraph (d)(2) of this section, within 30 days of the school's receipt of the check.

(ii) If the loan proceeds are disbursed by means of a check that requires the endorsement of both the borrower and the school, the school shall—

(A) In the case of the initial disbursement on a loan, endorse the check on its own behalf, and, after the student has registered, deliver it to the student subject to paragraph (d)(2) of this section, within 30 days of the school's receipt of the check; or

(B) Obtain the borrower's endorsement on the check, endorse the check on its own behalf and, after the student has registered, credit the student's account, in accordance with paragraph (d)(1) of this section, and deliver the remaining loan proceeds to the student, as specified in § 668.164(e).

(3) If the loan proceeds are disbursed by electronic funds transfer to an account of the school in accordance with § 682.207(b)(1)(ii)(B), or by master check in accordance with § 682.207(b)(1)(ii)(C), the school must, unless authorization was provided in the loan application, obtain the student's, or in the case of a PLUS loan, the parent borrower's written authorization for the release of the initial and any subsequent disbursement of each FFEL loan to be made, and after the student has registered either—

(i) Deliver the proceeds to the student or parent borrower as specified in § 668.164; or

(ii) Credit the student's account in accordance with paragraph (d)(1) of this section and § 668.164, notify the student or parent borrower in writing that it has so credited that account, and deliver to the student or parent borrower the remaining loan proceeds not later than the timeframe specified in 668.164.

(4) A school may not credit a student's account or release the proceeds of a loan to a student who is on a leave of absence, as described in § 668.22(j).

(5) A school may not release the first installment of a Stafford or SLS loan for endorsement to a student who is enrolled in the first year of an undergraduate program of study and who has not previously received a Stafford or SLS loan until 30 days after the first day of the student's program of study.

(6) Notwithstanding any other provision of this section, unless § 682.207(c)(4) or (5) applies—

(i) If a loan period is more than one payment period, the school shall deliver loan proceeds at least once in each payment period; and

(ii) If a loan period is one payment period, the school shall make at least two deliveries of loan proceeds during that payment period. The school may not make the second delivery until the calendar midpoint between the first and last scheduled days of class of the loan period.

(7) If an educational. program measures academic progress in credit hours and does not used semesters, trimesters, or quarters, the school may not deliver a second disbursement until the later of—

(i) The calendar midpoint between the first and last scheduled days of class of the loan period; or

(ii) The date, as determined by the school, that the student has completed half of the academic coursework in the loan period.

(8) If an educational program measures academic progress in clock hours, the school may not deliver a second disbursement until the later of—

(i) The calendar midpoint between the first and last scheduled days of class of the loan period; or

(ii) The date, as determined by the school, that the student has completed half of the clock hours in the loan period.

(9) The school must deliver loan proceeds in substantially equal installments, and no installment may exceed one-half of the loan.

(g) Exit Counseling.

(1) A school shall conduct in-person exit counseling with each Stafford of SLS borrower shortly before the borrower ceases at least half-time study at the school, except that –

(i) In the case of a student enrolled in a correspondence course, the school shall provide the borrower with written

counseling materials within 30 days after the borrower completes the program; and

(ii) If the borrower withdraws from school without the school's prior knowledge or fails to attend an exit counseling session as scheduled, the school shall mail written counseling material to the borrower at the borrower's last known address within 30 days after learning that the borrower has withdrawn from school or failed to attend the scheduled session.

(2) In conducting the exit counseling, the school shall—

(i) Inform the student of the average anticipated monthly repayment amount based on the student's indebtedness or on the average indebtedness of students who have obtained Stafford of SLS loans for attendance at that school or in the borrower's program of study.

(ii) Review for the borrower available repayment options (e.g., loan consolidation, refinancing);

(iii) Suggest to the borrower debt-management strategies that the school determines would best assist repayment by the borrower;

(iv) Include the matters described in paragraph (f)(2) of this section;

(v) Review with the borrower the conditions under which the borrower may defer repayment or obtain partial cancellation of a loan; and

(vi) Require the borrower to provide corrections to the institution's records concerning name, address, social security number, references, and driver' license number, as well as the borrower's expected permanent address, the address of the borrower's next of kin, and the name and address of the borrower's expected employer that will then be provided within 60 days to the guaranty agency or agencies listed in the borrower's records.

(3) Additional matters that the Secretary recommends that a school include in the exit counseling session or materials are set forth in appendix D to 34 CFR part 668.

(4) The school shall maintain in the student borrower's file documents substantiating the school's compliance with paragraphs (f)-(g) of this section as to that borrower.

(h) Treatment of excess loan proceeds. Except as provided under paragraph (i) of this section, or in the case of a student attending a foreign school, if, before the delivery of any Stafford or SLS loan disbursement, the school learns that the borrower will receive or has received financial aid for the period of enrollment for which the loan was made that exceeds the amount of assistance for which the student is eligible, the school shall reduce or eliminate the overaward by either—

(1) Using the student's SLS, PLUS, nonsubsidized or unsubsidized Stafford, or State-sponsored or private loan to cover the expected family contribution, if not already done;

(2)(i) Returning the entire undelivered disbursement to the lender or escrow agent; and

(ii) Providing the lender with a written statement—

(A) Describing the reason for the return of the funds, if any;

(B) Setting forth the student's revised financial need; and

(C) Directing the lender to re-disburse a revised amount and, if necessary, revise subsequent disbursements to eliminate the overaward; or

(3) Returning to the lender any portion of the disbursement for which the student is ineligible and providing the lender with a written statement explaining the return of the funds.

(i) For purposes of paragraph (h) of this section, funds obtained from any Federal College Work-Study employment that do not exceed the borrower's financial need by more than $300 may not be considered as excess loan proceeds.

Supreme Court, U.S.
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No. 99-540

In the Supreme Court of the United States

EDDIE BARTELS, ET AL., PETITIONERS

v.

RICHARD RILEY, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal student loan program, which has since been modified, but which, at the time pertinent here, provided that a borrower could use school misconduct as a defense against a lender only if the lender had an "origination relationship" with the school, preempts a state law allowing a borrower to use the school's misconduct as a defense against the lender under a broader set of circumstances.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the judgment is noted at 189 F.3d 483 (Table). The opinion of the district court (Pet. App. 14a-29a) is reported at 918 F. Supp. 1565.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1999. The petition for a writ of certiorari was filed on September 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Guaranteed Student Loan Program (GSLP) was established by Congress as part of the Higher

Education Act of 1965 (HEA), 20 U.S.C. 1071 *et seq.*[1] The GSLP encourages private lending to students who would otherwise be unable to finance their educations by offering private lenders federal subsidies and a loan guarantee backed by federal reinsurance. The GSLP also encourages student loans by facilitating the purchase of the loans in the secondary market. Those purchases provide primary lenders with cash to make additional loans.

During the 1980s, the Department of Education encouraged lenders to make GSLP loans, in part by limiting lender exposure to defenses against collection efforts based on school misconduct. The Department considered a lender to be subject to such state-law, school-based defenses only if it had an "origination" relationship with the school (and in certain other limited circumstances not relevant here). See 34 C.F.R. 682.200, 682.206(a)(2) (1988); Letter from Acting Assistant Secretary Kenneth D. Whitehead to Hon. Stephen J. Solarz (May 19, 1988) (stating that "a student who borrows under the GSL program from a third party lender remains responsible for repaying the loan even if the school closes" unless an "origination relationship" exists between the lender and the school); 55 Fed. Reg. 48,327 (1990) (describing Secretary's "longstanding view" that, absent an "origination relationship" between the lender and the school, "a student who borrows under the GSL program from a third-party lender remains legally responsible for repaying the loan, even if the school fails to provide the

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[1] In 1992, the GSLP was renamed the "Federal Family Education Loan Program." We follow the court of appeals' practice of using the name of the program as it existed between 1988 and 1991 in our discussion. Pet. 3 n.1; Pet. App. 3a.

student with the services purchased by the student"); 34 C.F.R. 682.604(f)(2)(iii) (1989) (providing that students should be counseled that they cannot raise school-related defenses on a loan "other than a loan made or originated by the school"); Letter from General Counsel Jeffrey C. Martin to Hon. Edward M. Kennedy, (Oct. 4, 1991) (explaining Department's view that "banks should be afforded protection from potential liability under state law for school misconduct" except in "a few narrow circumstances"); 57 Fed. Reg. 60,304 (1992).

The Department's regulations defined origination as a "special relationship" arising where the lender delegated to the school "substantial functions or responsibilities normally performed by lenders before making loans." 34 C.F.R. 682.200(b) (1988); 51 Fed. Reg. 40,890 (1986). Not every relationship between a lender and a school constituted such a special origination relationship. To the contrary, a close relationship between lender and school was *mandated* by the HEA and regulations and practices implementing the GSLP. Pet. App. 21a. For example, at the time that the loans at issue in this case were made (1988-1991), the regulations specified that the student had to submit the loan application to the school (rather than the lender). 34 C.F.R. 682.102(a) (1988). With minor exceptions, the loan proceeds had to be disbursed directly to the school. 20 U.S.C. 1078(b)(1)(N) (1988). The school determined the period for which the loan was made, which affected the loan's interest rate, 20 U.S.C. 1077a(g)(2) (1988). The school was required to provide the lender with information regarding the student's eligibility for the loan, the student's enrollment, the estimated cost of the student's attendance, the student's estimated financial assistance, and a statement evidencing the school's

determination of the student's need for the loan under federal guidelines. 20 U.S.C. 1078(a)(2) (1988); 34 C.F.R. 682.603(b) (1988).[2]

Congress significantly amended the HEA in 1992. Of particular relevance here, Congress directed the Secretary to develop a uniform loan application form and promissory note for the program. Pet. App. 20a n.3; 20 U.S.C. 1082(m)(1). The uniform promissory note developed by the Secretary contained a clause that allowed a borrower to assert against a lender any claim or defense that the borrower would have against a for-profit school, if the school had "referred" the borrower to, or was "affiliated with," the lender, as defined in applicable regulations. Pet. App. 5a n.2, 20a n.3. Congress also authorized specific relief for students who had taken out loans for education after January 1, 1986, and suffered specific problems, such as inability to receive the anticipated education due to school closure. 20 U.S.C. 1087(c).

2. This case concerns loans made to petitioners between 1988 and 1991 to attend courses at the Riley Institute, a Georgia vocational school. Pet. App. 3a. Petitioners allege that the school made misrepresentations to induce them to take out GSLP loans and to enroll in its educational programs and then failed to provide the promised educational and job placement services. Petitioners sued the school as well as the Secretary of the United States Department of Education and three guarantee agencies which held petitioners' promissory notes after petitioners defaulted on their loans: the Higher Education Assistance Founda-

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[2] An additional requirement, that the school provide the lender with the loan's distribution schedule, was added in 1989. See 20 U.S.C. 1078(a)(2)(A)(i)(III) (Supp. II 1990).

tion (HEAF), the Georgia Higher Education Assistance Corporation (GHEAC), and the Student Loan Marketing Association (Sallie Mae). Petitioners asserted claims for fraud, breach of contract, ex delicto contract breach, negligence per se, and unfair trade practices. *Id.* at 2a-4a. Petitioners sought rescission of their loan contracts, declaratory and injunctive relief, actual and punitive damages, attorneys' fees and costs. *Id.* at 15a. The only claim relevant to this petition is petitioners' claim for a declaratory judgment that, because Riley Institute acted as an agent for the original lenders under Georgia law, the loans are subject to defenses arising from Riley Institute's misrepresentations. Pet. i, 3.[3]

The district court dismissed all of petitioners' claims. Pet. App. 28a-31a. With respect to the claim based on Georgia agency law, the district court found that the HEA *mandated* the close relationship between school and lender that formed the basis of petitioners' agency claims under Georgia law. Pet. App. 21a. For that reason, the court concluded that petitioners' claims based on that broad theory conflicted with the purposes and procedures of the HEA and were therefore preempted by federal law. Pet. App. 21a-22a.

In an unpublished opinion, the Eleventh Circuit Court of Appeals affirmed. The court reasoned that petitioners' claims under Georgia agency law "would penalize lenders for participating in the GSLP program

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[3] The Secretary was not a defendant with respect to that claim, which was count one of petitioners' complaint. See Pet. App. 15a. Throughout this brief, we use the word "respondents" to refer to the defendants with respect to that claim—namely HEAF, GHEAC, and Sallie Mae—even though the Secretary is technically a respondent to the petition for a writ of certiorari as well.

according to its express terms." Pet. App. 8a. Because that result would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the court of appeals held that petitioners' claims were preempted by federal law. *Ibid.* (quoting *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987)).

Petitioners now seek this Court's review of only the question whether federal law preempts application of a state law allowing a borrower to assert school fraud as a defense to loan collection based on an "agency" relationship between the lender and the school. Pet. i, 3.[4]

ARGUMENT

The decision of the court of appeals is unpublished and does not conflict with any decision of this Court or any other court of appeals. In addition, the question presented by the petition lacks substantial prospective importance because of intervening statutory and regulatory changes. This Court's review is therefore not warranted.

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[4] Petitioners specifically abandoned all other claims in their petition:

> Petitioners sought a declaratory judgment that, because of the school's role in arranging these loans, the loans are subject to defenses arising from the school's misrepresentations. The common law of Georgia, like that of other states, provides that, where a seller acts as agent for a lender in arranging financing to pay for the seller's goods or services, the lender may be held responsible for misrepresentations made by the seller. *Petitioners also presented alternative theories for raising these defenses, but these alternative theories are not included in this petition.*

Pet. 3 (emphasis added) (citations omitted).

1. During the time period in which the loans at issue in this case were made, the Department of Education considered a lender under the Guaranteed Student Loan Program (GLSP) to be subject to state-law defenses based on school misconduct only in a limited set of circumstances, such as when the school performed so many loan-related functions that it "originated" the loan. See pp. 2-4, *supra*. Acting pursuant to its authority to implement the Higher Education Act of 1965 (HEA), 20 U.S. 1071 *et seq.*, the Department weighed the relative importance of (1) protecting borrowers from liability for GSLP loans used to attend schools that did not deliver promised training to their students, and (2) encouraging private lenders to make GSLP loans by protecting them from defenses based on the schools' actions. The Department determined that to protect students, state-law school-based defenses should be available where a lender had a particularly close relationship (an "origination" relationship) with the school; but, to encourage lending, state-law school-based defenses should not be available in other circumstances. As we explain more fully in our brief in opposition to the petition for a writ of certiorari in *Armstrong* v. *Accrediting Council for Continuing Education and Training, Inc.*, No. 99-395, state laws that recognize defenses based on school misconduct in a broader set of circumstances are preempted because they stand as an obstacle to those federal objectives. That conclusion is fully consistent with this Court's precedents concerning conflict preemption. See, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).[5]

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[5] As petitioners note (Pet. 1-2), the petition in *Armstrong* presents essentially the same question as the petition in this case. Petitioners have incorporated by reference (Pet. 5) the arguments

Petitioners argue (Pet. 3) that they are entitled to assert school-based defenses because an agency relationship (as defined by Georgia law) existed between the school and the lenders. According to petitioners, "agency" under Georgia law occurs whenever "a seller arranges a loan with a third party lender to pay for the seller's goods or services." C.A. Br. for Plaintiffs-Appellants 5; Pet. 3. Specifically, petitioners state that an agency relationship exists when a school procures a loan and obtains the student's signatures on all student loan documents. C.A. Br. for Plaintiffs-Appellants 5. If school-based defenses could be asserted whenever a school performed those activities, however, those defenses could always be asserted against GSLP lenders because the GSLP *required* a school participating in the program to undertake those activities.[6] That result would undermine the federal policy that school-based defenses should be available only in specified, limited circumstances. The court of appeals thus correctly rejected petitioners' contention that they could assert the Riley Institute's misconduct as a defense to repay-

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in support of the petition for a writ of certiorari in *Armstrong*. We likewise incorporate into our response in this case our arguments in response to the *Armstrong* petition.

[6] As noted in more detail at pages 3-4, *supra*, the statute required schools to provide information to students about loan availability and to lenders about a student's estimated cost of attendance, estimated financial assistance and loan disbursement schedule. 20 U.S.C. 1078(a)(2), 1092 (1988). Loan proceeds had to be paid directly to the school. 20 U.S.C. 1078(b)(1)(N) (1988). In addition, regulations required the student to submit the loan application to the school, not the lender. 34 C.F.R. 682.102(a) (1988). Regulations also provided for the school to complete forms and provide information to the lender as part of the loan process and prohibited the school from assessing fees for those services. 34 C.F.R. 668.12(b)(2)(iii), 682.603(b) (1988).

ment of their loans merely because an agency relationship existed under Georgia law between the Riley Institute and the lenders.

Petitioners are correct (Pet. 6, 7) that the court of appeals' reasoning is erroneous to the extent that it implies that the regulations permitting an origination relationship are the sole source of preemption (see Pet. App. 8a) or suggests that state-law defenses are preempted even if there was an origination relationship as defined by the regulations (see *id.* at 9a n.6). There is no need, however, for this Court to grant certiorari in order to correct any error that the court of appeals may have made, because the court of appeals' opinion is unpublished and thus "not considered binding precedent" under Eleventh Circuit Rule 36-2, and, as we explain below, there is no conflict or question of substantial continuing importance.

2. The decision of the court of appeals does not conflict with any decision of this Court. Petitioners incorrectly suggest (Pet. 6) that the decision conflicts with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), and *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987). In *Freightliner*, the Court held that state tort law imposing liability for failure to install anti-lock braking systems (ABS) in tractor-trailers was not preempted, because there was no federal regulation in effect either requiring or prohibiting ABS systems in those vehicles and no evidence that the federal regulatory agency decided that the vehicles should be free from state regulation on the subject. 514 U.S. at 286-287, 289-290. The Court concluded that "[a] finding of liability against petitioners [automobile manufacturers] would undermine no federal objectives or purposes with respect to ABS devices, since none exist." *Id.* at 289-290. Similarly, in *Guerra*, the Court deter-

mined that the purposes of the federal Pregnancy Discrimination Act would not be frustrated if States provided employees with greater protection than the federal law. 479 U.S. at 292.

Here, in contrast, federal objectives would be thwarted by the application of Georgia law as proposed by petitioners. The Department of Education determined during the period at issue that lenders should be subject to defenses based on school misconduct only in limited circumstances, such as when the school had so significant a role in the lending relationship that it "originated" the loan. See pp. 2-4, *supra*. The objective of that federal policy was to promote widespread access to student loans. Application of Georgia agency law, which (according to petitioners) would apply in many situations where an origination relationship did not exist, would undermine the federal objective by creating much greater lender liability, thus discouraging GSLP lending.

There is also no basis for petitioners' assertion (Pet. 7-8) that preemption of Georgia law lacks a sufficient statutory or regulatory basis or conflicts with this Court's decisions in *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988), and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Those cases refused to find preemption from congressional and agency decisions not to regulate. Here, in contrast, preemption arises because application of Georgia agency law would undermine the objectives of the HEA as reflected in the roles of the school and the lender under regulations governing the GSLP.

3. There is also no conflict among the courts of appeals. Petitioners purport to identify only one such conflict, with *Veal* v. *First American Savings Bank*,

914 F.2d 909 (7th Cir. 1990). They contend (Pet. 2) that *Veal* "stated that state law defenses were not preempted by the Higher Education Act." Petitioners misread *Veal*. The district court in *Veal* had held that the state-law remedy of rescission *was* preempted by federal law. See 914 F.2d at 911; *Graham* v. *Security Sav. & Loan*, 125 F.R.D. 687, 692-693 (N.D. Ind. 1989). The district court had also held that plaintiffs failed to state a claim and that the HEA does not create a private right of action. *Id.* at 693. The court of appeals *affirmed* solely on the ground of failure to state a claim. 914 F.2d at 911. As a result, that court never addressed preemption.[7]

The other courts that have addressed similar questions have uniformly held that similar state-law, school-based defenses are preempted. *Armstrong* v. *Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, as amended, 177 F.3d 1036 (D.C. Cir. 1999), petition for cert. pending, No. 99-395; *Bogart* v. *Nebraska Student Loan Program*, 858 S.W.2d 78, 81 (Ark. 1993); *Morgan* v. *Markerdowne Corp.*, 976 F. Supp. 301 (D.N.J. 1997); *Crawford* v. *American Inst. of Prof'l*

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[7] The footnote from *Veal* on which petitioners apparently rely (see Pet. 22, *Armstrong*, *supra* (No. 99-385)), simply states that, "if sued by a Lender in state court for collection of one of these loans, each of these plaintiff students would be entitled to assert any defenses *available* under state law *that are applicable to his or her particular loan*." 914 F.2d at 915 n.7 (emphasis added). That footnote reflects the fact that the HEA does not preempt *the entire field* of loan defenses. Therefore, state-law defenses may be "available" to student debtors and "applicable" to the students' loans to the extent those defenses do not actually conflict with federal law. Thus, apart from the fact that the footnote was not part of the holding in *Veal*, it is consistent with the decision in this case.

Careers, 934 F. Supp. 335 (D. Ariz. 1996); *Tipton* v. *Secretary of Educ.*, 768 F. Supp. 540 (S.D. W.Va. 1991); see also *Williams* v. *National Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 282 (E.D. Pa. 1993) (state law arguably allowing school-based defenses for certain forms of contracts inapplicable to student loan because federal statute governs form of student loan transaction), aff'd, 37 F.3d 1491 (3d Cir. 1994) (Table).

4. Finally, the question presented lacks substantial prospective importance because statutory and regulatory changes made in 1992 and later years eliminate the issue from more recent loans and provide alternative relief for many earlier loans. As a result of the 1992 amendments to the HEA, all GSLP loans issued during or after 1994 contain a clause allowing students to assert against the lender any defense that would have been available against the school if the school was "affiliated with" the lender or "referred" the student to the lender, as defined in applicable regulations. Pet. App. 5a n.2, 20a n.3. In addition, 20 U.S.C. 1087(c), enacted in 1992 and amended thereafter, provides for the discharge of a GSLP loan made in or after 1986 if the student is unable to complete a program due to school closure, the school falsely certified the student's eligibility, or the school failed to make a refund owed to the lender. Thus, the question decided by the court below is relevant only to the small number of cases in which a student asserts a state-law, school-based defense against the lender, the loan was made before 1994, and none of the bases for discharge listed in 20 U.S.C. 1087(c) is present. Because those circumstances are so narrow, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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